

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

IN RE: FACEBOOK, INC. CONSUMER  
PRIVACY USER PROFILE LITIGATION,

This document relates to:

ALL ACTIONS

MDL No. 2843  
CASE NO. 3:18-MD-02843-VC-JSC

Hon. Vince Chhabria  
Courtroom 4 – 17th Floor  
Special Master: Daniel Garrie, Esq.

**SUPPLEMENTAL ORDER REGARDING  
THE USE OF TAR**

**JAMS REF. NO: 1200058674**

## BACKGROUND

1. On August 18, 2021, Special Master Daniel Garrie ("Special Master Garrie") and Judge Gail Andler declared an impasse on the issue of whether Facebook should be compelled to use Technology Assisted Review ("TAR") in their review and production.

2. Pursuant to the Protocol for Resolving Discovery Disputes, Plaintiffs submitted their opening brief regarding the use of TAR on August 30, 2021. Plaintiffs argue that requiring Facebook to implement TAR is within the Special Master's discretion and that Facebook should be compelled to use TAR because (a) TAR will increase the pace of discovery, which Plaintiffs assert is currently insufficient to meet the needs of the case; and (b) implementing a TAR protocol will increase cooperation and transparency in discovery, which Plaintiffs assert have been insufficient thus far as "Facebook has continued to assert an unduly narrow view of relevance".

See Exhibit A (Plaintiffs' Brief Regarding the Use of TAR).

3. Pursuant to the Protocol for Resolving Discovery Disputes, Facebook submitted their Opposition to Motion to Compel TAR on September 9, 2021. Facebook argues that (a) the ESI Protocol forecloses Plaintiffs' request that the Special Master compel TAR; (b) the case Law unanimously rejects Plaintiffs' request for an order compelling TAR; (c) Plaintiffs offer no justification for an order compelling Facebook to use TAR; and (d) compelling Facebook to use TAR at this stage would delay discovery. See Exhibit B (Facebook's Opposition to Motion to Compel TAR).

4. Under the Protocol for Resolving Discovery Disputes, Plaintiffs submitted their Reply Brief Regarding the Use of TAR on September 14, 2021, in which they argue, among other things, that (a) implementing TAR will make discovery more efficient; (b) TAR will ad-

vance cooperation and transparency; (c) Plaintiffs have identified numerous deficiencies in Facebook's production; (d) Facebook is not on track to meet the substantial completion deadline; and (e) Facebook's governmental productions are the bare minimum of what's required. See Exhibit C (Reply Brief Regarding the Use of TAR).

5. On September 22, 2021, Special Master Garrie issued an Order Regarding the Use of TAR in which he ordered Facebook (a) to provide responses regarding the tools and methodologies used in their review; and (b) to make available a technical knowledgeable in the analytics, review tools, and methodologies used in Facebook's production to guide Special Master Garrie through an in-camera review of samples of the documents reviewed and to explain the review process. See Exhibit D (Order Regarding the Use of TAR).

6. On September 30, 2021, Facebook responded to the tools and methodologies used in its review according to the Order Regarding the Use of TAR. See Exhibit E (FB Supplemental Submission re: TAR).

7. On October 5, 2021, Special Master Garrie held an ex parte hearing with Counsel for Facebook and a technical resource was available to discuss the FB Supplemental Submission re: TAR and Facebook's review process.

8. On October 7, 2021, Facebook submitted the Declaration of Danny Thong ISO Facebook's Opposition to Plaintiffs' Motion to Compel TAR which clarifies Facebook's use of analytics and other tools in their review. See Exhibit F (Declaration of Danny Thong ISO Facebook's Opposition to Plaintiffs' Motion to Compel TAR).

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## FINDINGS

9. Special Master Garrie finds that it is not appropriate to compel a party to use TAR without a "showing of gross negligence in the review and production process, the failure to produce relevant specific documents known to exist or that are likely to exist or other malfeasance." *Winfield v. City of New York*, No. 15-cv-05236, 2017 WL 5664852, \*4 (SDNY November 27, 2017) at \*9; see also *In re Mercedes-Benz Emissions Litig.*, No. 2:16-CV-00881, 2020 WL 103975, at \*2 (D.N.J. January 9, 2020) (the court "left open the possibility of compelling the use of TAR "if Plaintiffs contend that Defendants' actual production is deficient.").

10. Special Master Garrie finds that Plaintiffs do not offer sufficient justification for compelling Facebook to use TAR because there do not appear to be deficiencies in Facebook's production to date and Facebook appears to be on pace to meet the January 31, 2022 deadline for substantial completion of discovery.

11. Special Master Garrie finds that implementing TAR at this stage is not likely to make discovery more efficient as Facebook has already completed over two thirds of its review and Facebook is on pace to meet the substantial completion deadline for discovery.

12. Special Master Garrie finds that advancing cooperation and transparency is not sufficient justification for compelling TAR as Facebook's supplemental submissions regarding their review have clarified their use of analytics and other tools. See Exhibits E and F. Facebook has only used analytics and other tools to prioritize documents for review, not to filter nonresponsive documents, which is permitted by the ESI Protocol.

13. Special Master Garrie finds that Facebook's production does not appear to date to be deficient based on Facebook's submissions, the ex parte hearing, and in-camera review of production samples.

14. Special Master Garrie finds, based on Facebook's submissions, the ex parte hearing, and in-camera review of production samples, that Facebook appears to be on pace to meet the substantial completion deadline for discovery as they have already reviewed over two thirds of the documents in the review population.

15. Special Master Garrie finds that Plaintiffs' argument that "Facebook's governmental productions are the bare minimum of what's required" fails because Facebook's governmental productions account for approximately 12% of the documents produced to date.

### **ORDER**

16. Special Master Garrie denies the Plaintiffs' request to order Facebook to use TAR.

**IT IS SO ORDERED.**

October 9, 2021

A handwritten signature in dark ink, appearing to read "Daniel B. Garrie", is written over a horizontal line.

Daniel Garrie  
Discovery Special Master

# EXHIBIT A

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

IN RE: FACEBOOK, INC. CONSUMER  
PRIVACY USER PROFILE LITIGATION

MDL No. 2843  
Case No. 18-md-02843-VC-JSC

This document relates to:  
  
ALL ACTIONS

**PLAINTIFFS' BRIEF REGARDING THE  
USE OF TECHNOLOGY-ASSISTED  
REVIEW**

Judge: Hon. Vince Chhabria  
Hon. Jacqueline Scott Corley  
Special Master Daniel Garrie  
Courtroom: 4, 17th Floor

JAMS Ref. No.: 1200058674

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**Secondary Sources**

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## I. PLAINTIFFS' SEPARATE STATEMENT

Pursuant to ¶ 6 of the Protocol for Resolving Discovery Disputes—Order No. 1, ECF No. 733, Plaintiffs' Separate Statement Regarding the Use of Technology-Assisted Review is provided at Attachment A.

## II. INTRODUCTION

Plaintiffs are in the strange posture of moving the Special Master to require Facebook to implement a tool it repeatedly told Plaintiffs, the Special Master, and the Court it wanted to use. The Special Master should compel Facebook to implement technology-assisted review (TAR).

Ordering the implementation of TAR will increase the pace of Facebook's production. As Facebook wrote in its May 6, 2021 discovery mediation submission, TAR will "allow Facebook to get responsive documents to Plaintiffs faster, allow the parties to complete document discovery more quickly, and relieve Facebook from reviewing large swaths of categorically non-responsive documents."<sup>1</sup> Plaintiffs agree. TAR will therefore advance the guiding purpose of the Federal Rules of Civil Procedure: "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

Equally important, an appropriate TAR protocol will also require Facebook to meet the Court's "expect[ation of] cooperation on issues relating to the preservation, collection, search, review, and production of ESI." U.S. Dist. Ct., N. Dist. of Cal., *Guidelines for the Discovery of Electronically Stored Information*, Guideline 1.02 (Cooperation), available at [https://www.cand.uscourts.gov/filelibrary/1117/ESI\\_Guidelines-12-1-2015.pdf](https://www.cand.uscourts.gov/filelibrary/1117/ESI_Guidelines-12-1-2015.pdf). Among other failures to cooperate, the parties have disagreed about what is relevant (*i.e.*, the "review[] and production of ESI") since the onset of this case. *Id.* Each time a particular disagreement is adjudicated, the Court sides with Plaintiffs, finding Facebook's definition of relevance, as Judge Chhabria put it, "unduly narrow." Mar. 5, 2020 Case Mgmt. Conf. Tr., Ex. 1 at 28:25-29:5.<sup>2</sup> Nevertheless, Facebook continues to define relevance so as to withhold, not produce, a wide

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<sup>1</sup> To reduce the amount of paper submitted in connection with this discovery dispute, Plaintiffs have not provided the parties' discovery mediation submissions referenced here. We are happy to provide them at the Special Master's request.

<sup>2</sup> Unless specified otherwise, all exhibit citations refer to the Declaration of Lesley Weaver filed herewith.

spectrum of relevant documents. Because “TAR requires ‘an unprecedented degree of transparency and cooperation among counsel in the review and production of ESI responsive to discovery requests,’” *In re Valsartan, Losartan, & Irbesartan Prods. Liab. Litig.*, 337 F.R.D. 610, 622 (D.N.J. 2020) (quoting *Progressive Cas. Ins. Co. v. Delaney*, No. 2:11-cv-00678-LRH-PAL, 2014 WL 3563467, at \*10 (D. Nev. July 18, 2014)), requiring Facebook to use TAR will finally enable the parties, with the assistance of the Special Master, to address—and *resolve*—disagreements about relevance that have plagued discovery from the outset.

### III. RELEVANT BACKGROUND

On September 9, 2019, Judge Chhabria largely denied Facebook’s motion to dismiss Plaintiffs’ first amended consolidated complaint. He upheld allegations on behalf of a putative class of all U.S. Facebook users between 2007 and present related to four broad categories of wrongdoing: (1) Facebook’s improperly provision of access to users’ friends’ information to app developers; (2) Facebook’s continued, improper provision of such access to “whitelisted apps” after announcing it would no longer provide apps access to users’ friends’ information; (3) Facebook’s improper provision of users’ and users’ friends information to its “business partners”; and (4) Facebook’s failure to take action to prevent third parties from misusing the private user information it allowed them to access.

Plaintiffs served their first, second, third, and fourth sets of requests for production of documents on August 28, 2018, November 25, 2019, May 6, 2020, and June 12, 2020, respectively. All told, Plaintiffs have served 63 requests for production.

In response to Plaintiffs’ requests for production, Facebook has produced only 500,000 documents comprising fewer than 2 million pages. More than half of the documents consist of data Facebook collected from current and former named plaintiffs that was available to those plaintiffs themselves. (Plaintiffs continue to seek production of internal Facebook documents reflecting information it has about the named plaintiffs that they can’t access.) And more than 84,000 of the documents—another 17% of the total production—comprise embedded images, such as .bmp files spun out from PowerPoint files, that appear to lack any meaningful content.

1 Meanwhile, Facebook’s production of custodial documents, which didn’t begin until December 7,  
2 2020, averages fewer than 10,000 documents per month.

3 Facebook has been unwilling to discuss other sources of relevant discovery. It maintains  
4 relevant documents and information in numerous non-custodial sources of ESI, including but not  
5 limited to Quip, a collaborative software suite that Facebook employees used to create and edit  
6 documents and spreadsheets as a group; Tasks, a series of files reflecting individual privacy and  
7 other relevant decisions that are recorded in a standardized format; Privatron (also referred to as  
8 Launch Cal), a tool which documents the Privacy XFN team’s decisions; Hive, a database that,  
9 among other things, stores data about Facebook’s users and records relevant API calls; and  
10 Scuba, a database from which Facebook employees were able to quickly pull data for internal  
11 analysis. Despite Plaintiffs’ repeated requests, Facebook has not identified the time period of the  
12 records contained in these (or other) non-custodial sources, has not disclosed with any level of  
13 specificity the type of information they contain, and has not discussed how such relevant  
14 information can be extracted, processed, and produced.

15 The parties agree that the pace of production is too slow. In their April 5, 2021 Joint  
16 Status Update, Facebook stated it would assess whether TAR could expedite its review process.<sup>3</sup>  
17 During the parties’ April 6 discovery hearing, Facebook lamented that linear document review  
18 had become “very costly,” with “a hundred people reviewing documents as we speak,” and  
19 looked forward to working with the discovery mediators “to develop the most flexible, efficient,  
20 fluid, fair, reasonable, pragmatic approach” to “get discovery done.”<sup>4</sup>

21 During discovery mediation, Facebook urged the implementation of TAR. In its April 20  
22 mediation submission, Facebook agreed that discovery is moving too slowly and suggested that  
23 TAR may be a productive tool to expedite document production. In its April 29 submission,  
24 Facebook stated that “[u]sing TAR would make Facebook’s review faster, relieve Facebook from  
25 reviewing large swaths of categorically non-responsive documents, and allow the parties to  
26 complete document discovery more quickly.” In its May 6 submission, Facebook stated that “[a]

27  
28 <sup>3</sup> Ex. 2 at 9 (Joint Status Update (Apr. 5, 2021), ECF No. 650).

<sup>4</sup> Ex. 3 at 8:24-9:7 (Apr. 6, 2021 Discovery Conf. Tr.).

1 properly designed TAR protocol would benefit all parties” because “[i]t would allow Facebook to  
2 get responsive documents to Plaintiffs faster, allow the parties to complete document discovery  
3 more quickly, and relieve Facebook from reviewing large swaths of categorically non-responsive  
4 documents.” Facebook also accused Plaintiffs of categorically rejecting the use of TAR. This  
5 was never the case. Plaintiffs simply sought more information about what TAR process would be  
6 implemented and agreement on key facets of the process.

7 Starting in April, and continuing through the last days of June, the Parties and discovery  
8 mediators, at Facebook’s insistence, devoted long hours to discussing whether and how TAR  
9 could be implemented to increase the pace of discovery. Though it was Facebook that proposed  
10 TAR, the discovery mediators asked Plaintiffs to provide an initial draft protocol, which they did  
11 within four days. Facebook then took three weeks to respond, and its response was a document  
12 merely identifying several aspects of what it wanted an eventual protocol to include. After further  
13 discussions, Plaintiffs agreed on June 23 to accept, without prior review, a mediators’ proposal  
14 for a TAR protocol.<sup>5</sup> Five days later, the discovery mediators informed Plaintiffs that Facebook  
15 was no longer interested in using TAR.

16 These fruitless negotiations over a method aimed at increasing efficiency and reducing  
17 costs were inefficient and costly. The discovery mediators prepared for and conducted numerous  
18 mediation sessions, most lasting a half-day or more, during which TAR was the primary focus of  
19 discussion. From April through June, it was negotiations over TAR that largely occupied the  
20 discovery mediators and the parties, limiting their ability to address other disputed issues. All  
21 told, the parties and discovery mediators collectively spent hundreds of hours working on TAR,  
22 only for Facebook to pull out at the last minute. Plaintiffs engaged an ESI expert, Kelly Twigger,  
23 to assist in the discussions of TAR; Ms. Twigger and her staff alone spent more than 60 hours on  
24 TAR during this time period.<sup>6</sup>

25  
26  
27 <sup>5</sup> Ex. 4 at 1-2 (Plaintiffs’ Opp. to Defendant Facebook, Inc.’s Admin. Mot. for Leave to File a  
Response to Joint Discovery Letter Brief Regarding TAR (July 19, 2021), ECF No. 707).

28 <sup>6</sup> Ex. 5 at ¶ 10 (Decl. of Kelly Twigger attached as Plaintiffs’ Ex. B to the Joint Discovery Letter  
Brief Regarding TAR (July 2, 2021), ECF No. 697-2).

Facebook has not proposed anything aimed at increasing the pace of production. Rather, it now asserts that “traditional human review,” which has slowed the pace of production to a trickle, will enable it to complete document review and production more efficiently than an appropriate TAR protocol.<sup>7</sup> This is a reversal of its earlier, repeated statements, which find support in the literature and numerous judicial opinions, that TAR would lead to faster, more efficient, and less expensive completion of document production.

#### IV. ARGUMENT

##### A. The Special Master Can Require Facebook to Implement TAR

Requiring Facebook to implement TAR is within the Special Master’s discretion.

It is axiomatic that “[t]he district court has wide discretion in controlling discovery.” *Blackburn v. United States*, 100 F.3d 1426, 1436 (9th Cir. 1996) (internal quotation and citation omitted); see *In re Actavis Holdco, U.S., Inc.*, No. 19-3549, 2019 WL 8437021, at \*1 (3d Cir. Dec. 6, 2019) (affirming MDL district court’s “wide latitude in controlling discovery,” including discretion to order the “production of documents without a manual relevance review”) (collecting cases), *cert. denied sub nom. Actavis Holdco U.S., Inc. v. Connecticut*, 141 S. Ct. 124 (2020).

In exercising this discretion, courts have compelled recalcitrant parties to use TAR.

*Winfield v. City of New York* is instructive. There, the Court directed the City to begin using TAR “to hasten the identification, review, and production of documents responsive to Plaintiffs’ document requests.” *Winfield*, No. 15-cv-05236, 2017 WL 5664852, \*4 (S.D.N.Y. Nov. 27, 2017). As here, “Plaintiffs have sought wide-ranging discovery, which the [Defendant] has resisted vigorously.” *Id.* As here, “the parties disagreed as to the search terms that would be applied to the electronic documents collected from” custodians. *Id.* As here, the City “applied a set of search terms that was heavily negotiated by the parties, with some guidance from the Court, . . . then began reviewing the electronic documents from these custodians.” *Id.* And as here, “Plaintiffs lodged numerous complaints about the pace of discovery and document review.” *Id.* In response, “given the volume of documents collected, [the] Court directed the City . . . to begin

<sup>7</sup> Ex. 6 at 5 (Joint Discovery Letter Brief Regarding TAR (July 2, 2021), ECF No. 697).

1 using Technology Assisted Review (‘TAR’) software . . . to hasten the identification, review, and  
2 production of documents responsive to Plaintiffs’ document requests.” *Id.*

3 *Independent Living Center of Southern California v. City of Los Angeles* provides another  
4 example. As here, Los Angeles had several million documents it needed to search to respond to  
5 Plaintiffs’ requests for production. Ex. 7 at 1 (Civil Minute Order, *Independent Living Ctr.*, CV  
6 12-551-FMO (PJW) (C.D. Cal. June 26, 2014), ECF No. 375). As here, the parties engaged in  
7 “months of haggling” over search terms. *Id.* Echoing what Facebook earlier said in this case, the  
8 Court determined that using search terms “would have resulted in both sides spending tremendous  
9 amounts of time and money going through those documents.” *Id.* Thus, “the Court ordered the  
10 City to use predictive coding to locate the most relevant documents.” *Id.*; see Ex. 8 (Discovery  
11 Order, *EORHB, Inc. v. HOA Holdings LLC*, No. 7409-VCL (Del. Ch. May 6, 2013) (directing the  
12 parties to use TAR *sua sponte* or show cause why TAR should not be used)).

13 While there are important differences between those cases and this, the differences  
14 militate further in favor of compelling the use of TAR here. First, neither *Winfield*, nor  
15 *Independent Living Center*, nor *EORHB* indicates that the party compelled to implement TAR  
16 was ever in favor of its implementation. In contrast, Facebook previously advocated for the  
17 implementation of TAR. See *infra* § IV.B.1. Second, *Independent Living Center* expressed  
18 concern regarding the expense being imposed on the City of Los Angeles. See Ex. 7 at 2-3 (noting  
19 that the Court’s order had already resulted in Los Angeles spending \$50,000 to hire a vendor to  
20 implement TAR, and ordering cost splitting if the plaintiffs wanted quality assurance to test the  
21 system’s reliability). In contrast, Facebook sought to implement TAR because it would save  
22 money, referring to linear document review as “very costly.” Plus, Facebook reported more than  
23 \$29 billion in revenues for the second quarter of 2021 alone. Even if TAR is expensive, the  
24 concerns are less acute for it than for Los Angeles.

25 Moreover, even where Courts have denied requests to impose TAR, they have done so  
26 without prejudice, stating they would impose it later if production using other methods was  
27 deficient. For example, in *In re Mercedes-Benz Emissions Litigation*, the Special Master noted  
28



1 “wide acceptance that TAR is cheaper, more efficient and superior to keyword searching” and left  
 2 open the possibility of compelling the use of TAR “if Plaintiffs contend that Defendants’ actual  
 3 production is deficient.” *In re Mercedes-Benz Emissions Litig.*, No. 2:16-CV-00881, 2020 WL  
 4 103975, at \*2 (D.N.J. Jan. 9, 2020). The deficiency of Defendants’ production to date is a primary  
 5 reason the Special Master should compel Facebook to implement TAR. *See infra* § IV.B.1.

6 Each of the orders discussed above is consistent with the foundational principle of the  
 7 Federal Rules of Civil Procedure—namely, that the Rules “should be construed, administered,  
 8 and employed by the court and the parties to secure the just, speedy, and inexpensive  
 9 determination of every action and proceeding,” Fed. R. Civ. P. 1. Discovery here has been neither  
 10 just, nor speedy, nor inexpensive. Compelling Facebook to implement TAR will advance those  
 11 goals.

## 12 **B. The Special Master Should Compel Facebook to Implement TAR**

### 13 **1. Facebook Was Right—TAR Will Increase the Pace of Discovery**

14 Facebook was for TAR before it was against it.

15 In an April 20 mediation submission, Facebook agreed that discovery is moving too  
 16 slowly and suggested that TAR may be a productive tool to expedite document production. In a  
 17 submission nine days later, Facebook stated that “[u]sing TAR would make Facebook’s review  
 18 faster, relieve Facebook from reviewing large swaths of categorically non-responsive documents,  
 19 and allow the parties to complete document discovery more quickly.” In its May 6 submission,  
 20 Facebook stated that “[a] properly designed TAR protocol would benefit all parties” because “[i]t  
 21 would allow Facebook to get responsive documents to Plaintiffs faster, allow the parties to  
 22 complete document discovery more quickly, and relieve Facebook from reviewing large swaths  
 23 of categorically non-responsive documents.” Facebook has been proven right.

24 The pace of discovery is insufficient to meet the needs of the case. To date, Facebook has  
 25 produced just over 500,000 documents comprising fewer than 2 million pages. Most of these  
 26 documents were already available to plaintiffs or represent isolated embedded images that lack  
 27 meaningful content or discovery value. Meanwhile, on average fewer than 10,000 documents a  
 28



1 month dribble out of Facebook’s custodial production. Plaintiffs do not know for certain how  
 2 many of the almost six million custodial documents remain for Facebook to review, but there are  
 3 many other categories of documents even after this initial tranche of custodial documents are  
 4 reviewed.

5 Production in similar proceedings illuminates how deficient Facebook’s production has  
 6 been here. In the *Juul* MDL, Juul has produced 7.5 million documents, comprising more than 23  
 7 million pages, in a case where the motion to dismiss order was issued on April 13, 2021—more  
 8 than one-and-a-half years *after* Judge Chhabria’s motion to dismiss order here.<sup>8</sup> In the *San*  
 9 *Francisco Opioids Litigation*, Endo has produced more than 5.5 million documents, including  
 10 call data extracted from CRM databases; and Teva has produced more than 3.2 million  
 11 documents.<sup>9</sup> In the *Klein v. Facebook* antitrust case, Facebook itself produced over 12 million  
 12 pages of documents, six times the number of pages produced here, before the motion to dismiss  
 13 was even fully briefed.<sup>10</sup> The class period in this case is longer and the allegations upheld are  
 14 broader than in *Juul* or *Klein*. And unlike defendants in *Juul* or the *San Francisco Opioids*  
 15 *Litigation*, Facebook’s entire business is premised on the collection, processing, and distribution  
 16 of ESI. There is no legitimate reason Facebook’s production is so deficient.

17 As Facebook stated, TAR will assist in resolving this problem. TAR “‘can (and does)  
 18 yield more accurate results than exhaustive manual review, with much lower effort.’” *Da Silva*  
 19 *Moore v. Publicis Groupe*, 287 F.R.D. 182, 190 (S.D.N.Y. 2012) (quoting Maura R. Grossman &  
 20 Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and*  
 21 *More Efficient Than Exhaustive Manual Review*, 17 Rich. J.L. & Tech. 43, 48 (2011)). It also  
 22  
 23

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24 <sup>8</sup> Ex. 9 at 2 (Joint Discovery Status Report, *In re: Juul Labs, Inc., Marketing, Sales Practices, and*  
 25 *Products Liability Litigation*, Case No. 19-md-02913-WHO (N.D. Cal. Aug. 16, 2021), ECF No.  
 26 2255).

27 <sup>9</sup> Ex. 10 at 11, 12, & 16 (Joint Status Update, *The City and County of San Francisco and the*  
 28 *People of the State of California, Acting by and through San Francisco City Attorney Dennis J.*  
*Herrera v. Purdue Pharma L.P.*, Case No. 3:18-cv-07591-CRB (N.D. Cal. Aug. 23, 2021), ECF  
 No. 632).

<sup>10</sup> Ex. 11 at 10 (Second Joint Case Management Statement, *Klein v. Facebook, Inc.*, Case No.  
 5:20-cv-08570-LHK (N.D. Cal. June 30, 2021), ECF No. 114).

costs less. *Da Silva Moore*, 287 F.R.D. at 190; *see also Winfield*, 2017 WL 5664852, at \*4; *cf.* Ex. 7 at 1 (*Independent Living Ctr.*).

Facebook has complained about the burdens associated with the linear review of documents for production in this case. It said it is employing “more than 100 reviewers” who are “spending a tremendous amount of time reviewing non-responsive documents.”<sup>11</sup> It lamented that this is a “very costly” undertaking.<sup>12</sup> Requiring Facebook to implement TAR will address these concerns.

Returning to linear review, as Facebook now proposes, won’t. Nor will it increase the pace of production. Facebook offers no alternative to accelerating the pace of production and getting this case on track.

## 2. An Appropriate TAR Protocol Will Facilitate Transparency and Cooperation

Equally important, ordering Facebook to implement an appropriate TAR protocol will also facilitate Facebook in meeting its obligation to cooperate with Plaintiffs regarding discovery.

Guideline 1.02 (Cooperation) of the Northern District’s *Guidelines for the Discovery of Electronically Stored Information* states that parties are expected to cooperate “on issues relating to the preservation, collection, search, review, and production of ESI.” Cooperation means both “reasonably limiting ESI discovery requests on the one hand, and in reasonably responding to ESI discovery requests on the other hand.” Doing so “tends to reduce litigation costs and delay.” Unfortunately, Facebook has not met these expectations.

Most pertinent to this motion, Facebook has not cooperated on issues related to the review and production of ESI. Instead, it has consistently attempted to limit the production of ESI by improperly narrowing the scope of relevance. During a March 5, 2020 case management conference, Judge Chhabria repeated his previously stated concern about Facebook’s “unduly narrow view of what should be turned over to the Plaintiffs”:

I have said it a number of times on the record already. . . . I am concerned that Facebook has, you know, often made statements reflecting an unduly narrow view of what should be

<sup>11</sup> Ex. 2 at 9 (Joint Status Update (Apr. 5, 2021), ECF No. 650).

<sup>12</sup> Ex. 3 at 9:3 (Apr. 6, 2021 Discovery Conf. Tr.).

1 turned over to the Plaintiffs. And, you know, this is a big case. I mean, there is often a lot  
 2 of talk about proportionality and whatnot. This is a big case. It is a significant issue. . . .  
 3 [T]his is not the type of case where we are going to be saying: Well, that might end up --  
 4 that effort might end up uncovering some relevant information; but, you know, it is just  
 5 too expensive or difficult, and so we are not going to make Facebook do it.<sup>13</sup>

6 Nevertheless, Facebook has continued to assert an unduly narrow view of relevance. Each  
 7 time the Court has considered the parties' views on relevance, it has sided with Plaintiffs. Judge  
 8 Corley held that the production of named Plaintiffs' data is not limited to data which arose "from  
 9 user activity occurring on the Facebook platform," and that was "then overtly shared . . . with a  
 10 limited audience," as Facebook contended.<sup>14</sup> Rather, discoverable named plaintiffs' data includes  
 11 data collected from their on-platform activities, data obtained from third parties regarding the  
 12 named plaintiffs' off-platform activities, and data inferred from their on- or off-platform  
 13 activities.<sup>15</sup> Judge Corley similarly held that the definition of "business partners" was not limited,  
 14 as Facebook proposed, to "integration partners and/or device manufacturers with whom  
 15 Facebook has entered into agreements that have been and/or will be produced in response to  
 16 Request for Production No. 24."<sup>16</sup> Instead, the Court defined "business partners" as "all  
 17 companies with which Facebook agreed to exchange information about users' activities with each  
 18 other[.]"<sup>17</sup> Notably, these examples of Facebook's unduly narrow definition of relevance reflect  
 19 only the positions it has been forced to disclose. Facebook has not disclosed, and has been  
 20 unwilling to discuss, how it is defining relevance for the purpose of document review.

21 An appropriate TAR protocol will require the parties, with the Special Master's  
 22 assistance, to conclusively address foundational issues regarding relevance that have plagued  
 23 discovery from the start. "A long line of cases holds that TAR requires 'an unprecedented degree  
 24 of transparency and cooperation among counsel in the review and production of ESI responsive to  
 25 discovery requests.'" *In re Valsartan*, 337 F.R.D. at 622 (quoting *Progressive Cas. Ins. Co.*, 2014

26 <sup>13</sup> Ex. 1 at 28:25-29:5 (Mar. 5, 2020 Case Mgmt. Conf. Tr.).

27 <sup>14</sup> Ex. 12 at 1 (Discovery Order No. 9 (Oct. 20, 2020), ECF No. 557).

28 <sup>15</sup> *Id.*

<sup>16</sup> Ex. 13 at 2 (Order Re: Business Partners (Feb. 1, 2021), ECF No. 608).

<sup>17</sup> *Id.* at 3.

1 WL 3563467 at \*10). Plaintiffs have proposed a protocol that would provide for the level of  
2 transparency required by the particular needs of this case.<sup>18</sup>

3 Facebook's unilateral decision to withdraw from the TAR negotiations that it started  
4 furthers its efforts to keep Plaintiffs in the dark, to avoid the production of relevant documents,  
5 and to force Plaintiffs to toil for nearly every category of documents they seek. Doing so violates  
6 this District's Guideline 1.02 (Cooperation). It also violates Federal Rule of Civil Procedure 1.  
7 According to Facebook itself, linear review is inefficient, time-consuming, and *costly*. Moreover,  
8 it leads to deferred, piecemeal, seriatim disputes over relevance raised in the context of each of  
9 numerous facets of this case, leading to even more inefficiency, delay, and unnecessary costs.  
10 Compelling Facebook to implement an appropriate TAR protocol will force the cooperation it  
11 improperly seeks to avoid.

12 **C. The Special Master Should Enter a TAR Protocol Designed to Meet the Needs**  
13 **of the Case**

14 If the Special Master agrees with Plaintiffs that Facebook should be compelled to  
15 implement TAR, the Special Master should implement a TAR protocol designed to meet the  
16 particular needs of this case.

17 Specifically, the protocol should account for Facebook's refusal to provide the required  
18 transparency or cooperation regarding ESI, including the definition of relevance it is providing  
19 document reviewers; the horde of relevant document sources, custodial and non-custodial, that  
20 Facebook has not yet been willing to discuss with Plaintiffs; the two years that this case has  
21 already been in discovery; and the broad scope of the allegations upheld by the Court. Plaintiffs  
22 have drafted a proposed protocol aimed at addressing those issues, and have provided an expert  
23 declaration explaining the basis for the provisions therein.<sup>19</sup> Alternatively, as they have informed  
24 Facebook, the Court, and the Special Master, Plaintiffs are willing to accept, sight unseen, a  
25 protocol designed by the Special Master.

26 <sup>18</sup> Ex. 14 (Plaintiffs' Proposed TAR Protocol attached as Plaintiffs' Ex. A to the Joint Discovery  
27 Letter Brief Regarding TAR (July 2, 2021), ECF No. 697-1); Ex. 5 (ECF No. 697-2) (declaration  
28 of Plaintiffs' ESI expert Kelly Twigger explaining the bases and needs for the provisions in the  
proposal). Decl. of Kelly

<sup>19</sup> Ex. 14; Ex. 5.

Plaintiffs respectfully ask the Special Master not to open the design of the TAR protocol to negotiations or further briefing. The parties spent almost three months attempting to negotiate a protocol before Facebook decided it was no longer interested in implementing TAR. That time was more than sufficient for the parties to put forward and negotiate their proposals. Moreover, the Special Master has already spent many hours discussing potential TAR provisions with each party *ex parte*, and is thus already fully aware of their positions. Past being prologue, further negotiations are (unfortunately) more likely to result in additional delay than in agreement, and additional briefing is unnecessary.

## V. CONCLUSION

The Special Master should require Facebook to implement TAR, which will help the litigation of this action become more just, speedy, and inexpensive. Further, the Special Master should require Facebook to implement a TAR protocol that is designed to meet the specific needs of this case—either the protocol Plaintiffs have previously proposed or one designed by the Special Master.

Dated: August 30, 2021

Respectfully submitted,

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# ATTACHMENT A



**PLAINTIFFS' SEPARATE STATEMENT  
REGARDING THE USE OF TECHNOLOGY-ASSISTED REVIEW**

<i>Written Discovery</i>	<i>Discovery Response</i>	<i>Relevant History</i>	<i>Opposition</i>	<i>Executive Summary</i>
<p>N/A</p> <p>(The dispute concerns the process by which documents are searched for, reviewed, and produced.)</p>	N/A	<p>4/5/21: Joint Statement filed with Judge Corley; Facebook states it will assess whether TAR could expedite its review process.</p> <p>4/6/21: Discovery hearing before Judge Corley; Facebook tells the Court it looks forward to working with the discovery mediators to develop a better approach for completing discovery.</p> <p>4/15/21: Discovery mediation session at which the parties and mediators discuss TAR.</p> <p>4/20/21: Discovery mediation submission in which Facebook states discovery is moving too slowly and suggests TAR may be a</p>	<p>Facebook's opposition is spelled out in the parties' discovery dispute letter regarding the use of TAR, Dkt. No. 697, at 3-5.</p>	<p>The Special Master has the discretion to require Facebook to implement TAR, and courts have compelled recalcitrant parties to do so.</p> <p>As Facebook itself repeatedly stated, requiring Facebook to implement TAR here will increase the pace of Facebook's production, which is presently insufficient to meet the needs of the case. An appropriate TAR protocol will also enable the parties, with the assistance of the Special Master, to address and resolve foundational disagreements about relevance that have plagued discovery from the outset of this case.</p> <p>Implementing TAR will thereby advance the</p>



<i>Written Discovery</i>	<i>Discovery Response</i>	<i>Relevant History</i>	<i>Opposition</i>	<i>Executive Summary</i>
		<p>productive tool to expedite production.</p> <p>4/21/21: Discovery mediation session at which the parties and mediators discuss TAR.</p> <p>4/29/21: Discovery mediation submission in which Facebook advocates for implementing TAR.</p> <p>4/30/21: Discovery mediation session at which the parties and mediators discuss TAR.</p> <p>5/6/21: Discovery mediation submission in which Facebook states TAR will benefit all parties.</p> <p>5/7/21: Discovery mediation session at which the parties and mediators discuss TAR.</p> <p>5/13/21: Discovery mediation session at</p>		<p>purpose of the Federal Rules of Civil Procedure—“to secure the just, speedy, and inexpensive determination of every action and proceeding,” Fed. R. Civ. P. 1—and promote cooperation on issues relating to the collection, search, review, and production of ESI, as required by Guideline 1.02 (Cooperation) of the Northern District’s <i>Guidelines for the Discovery of Electronically Stored Information</i>.</p>

PLAINTIFFS’ SEPARATE STATEMENT  
REGARDING THE USE OF TECHNOLOGY-ASSISTED REVIEW

<i>Written Discovery</i>	<i>Discovery Response</i>	<i>Relevant History</i>	<i>Opposition</i>	<i>Executive Summary</i>
		<p>which the parties and mediators discuss TAR.</p> <p>5/17/21: Discovery mediation session at which the parties and mediators discuss TAR; the mediators ask Plaintiffs to draft a proposed TAR protocol.</p> <p>5/21/21: Plaintiffs circulate a proposed TAR protocol.</p> <p>6/11/21: Facebook responds to Plaintiffs' proposed TAR protocol with a summary of key TAR provisions "not intended to be complete or final"; discovery mediation session at which the parties and mediators discuss TAR.</p> <p>6/14/21: Discovery mediation session at which the parties and mediators discuss TAR.</p>		

PLAINTIFFS' SEPARATE STATEMENT  
REGARDING THE USE OF TECHNOLOGY-ASSISTED REVIEW

<i>Written Discovery</i>	<i>Discovery Response</i>	<i>Relevant History</i>	<i>Opposition</i>	<i>Executive Summary</i>
		<p>6/21/21: Discovery mediation session at which the parties and mediators discuss TAR; discovery mediators propose a double-blind mediator's TAR proposal.</p> <p>6/23/21: Discovery hearing during which Judge Corley orders the parties to submit positions jointly or individually on TAR by July 2.</p> <p>6/23/21: Plaintiffs inform the discovery mediators that Plaintiffs will accept the mediator's proposed TAR protocol without prior review.</p> <p>6/28/21: Discovery mediation session at which the parties and mediators discuss TAR; discovery mediators inform Plaintiffs that Facebook no longer</p>		

PLAINTIFFS' SEPARATE STATEMENT  
REGARDING THE USE OF TECHNOLOGY-ASSISTED REVIEW

<i>Written Discovery</i>	<i>Discovery Response</i>	<i>Relevant History</i>	<i>Opposition</i>	<i>Executive Summary</i>
		<p>wishes to implement TAR.</p> <p>7/2/21: Joint statement regarding the parties' positions on whether TAR should be implemented is filed with Judge Corley.</p> <p>7/20/21: Judge Chhabria issues order appointing Daniel Garrie as Special Discovery Master.</p> <p>7/26/21: Judge Corley refers the issue to the Special Discovery Master for resolution.</p>		

# EXHIBIT B

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

IN RE: FACEBOOK, INC. CONSUMER  
PRIVACY USER PROFILE LITIGATION,

This document relates to:

ALL ACTIONS

CASE NO. 3:18-MD-02843-VC-JSC

**FACEBOOK'S OPPOSITION TO  
MOTION TO COMPEL TAR**

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## INTRODUCTION

Plaintiffs ask the Special Master to take an unprecedented measure of compelling Facebook to use Technology Assisted Review (TAR) to cull non-responsive documents from the document universe that resulted from the parties' year-long negotiation of search strings, after Facebook dedicated nearly one year to reviewing the search-string hits manually. After an exhaustive search, Facebook has found no opinion in which a court has imposed TAR on a producing party over its objection. Rather, courts across the country have adhered to Sedona Principle 6 that producing parties are best situated to determine appropriate procedures and methodologies for reviewing and producing their own documents. Rather than engage with this threshold legal issue, Plaintiffs cite cases out of context that make passing references to TAR orders, in what appears to be an effort to create a false impression that the courts in those cases ordered TAR over the producing party's objection.

Plaintiffs argue the Special Master should force Facebook to use TAR because—five months ago—Facebook suggested the parties try to reach an agreement to use TAR to expedite its review and reduce review costs. Once it became clear that the parties could not agree to a TAR protocol that would remove non-responsive documents to streamline discovery, Facebook decided not to use TAR in this manner. Instead, Facebook focused substantial resources into an efficient, prioritized process supported by analytics for completing human review on all documents. That should have been the end of the matter: Under the ESI Protocol, the use of TAR is Facebook's option, not Plaintiffs'.

Plaintiffs also make a series of unsubstantiated, false attacks on Facebook that—even if true (they are not)—would not come close to justifying the unprecedented order they seek. The Court has repeatedly rejected these same accusations, advising Plaintiffs that Facebook has fulfilled its obligations to meet and confer about ESI; Facebook is entitled to review materials for responsiveness, relevance, and privilege; and Plaintiffs are not entitled to discovery regarding that review process.

Perhaps most concerning, Plaintiffs make clear that they ask the Special Master to compel TAR, not to expedite discovery but to slow it down and generate *more* disputes. The order Plaintiffs seek would potentially require Facebook to set aside a full year of document review conducted under its efficient, prioritized process just four months before the substantial completion deadline. Plaintiffs admit they want this detour for the improper purpose of challenging Facebook's relevance

determinations on a document-by-document basis. There will be a time and a place for Plaintiffs to identify any perceived gaps in Facebook’s productions. Adopting a new review process now would only slow down (or even halt) Facebook’s review—hijacking the schedule Judge Chhabria ordered and trapping the parties in endless disputes that would prevent this case from moving forward to the merits.

In asking the Special Master to compel TAR, Plaintiffs ask him to ignore the ESI protocol Judge Corley entered, Judge Chhabria’s instructions that Plaintiffs are not entitled to backseat drive Facebook’s responsiveness determinations, and the sound reasoning of every other court to have considered whether a producing party can be forced to use a TAR process over its clear objection. Facebook respectfully requests that the Special Master deny Plaintiffs’ motion.

## ARGUMENT

### **A. The ESI Protocol Forecloses Plaintiffs’ Request That The Special Master Compel TAR**

Plaintiffs’ request for an unprecedented order compelling Facebook to adopt a TAR process over its objection violates the ESI protocol that the parties agreed to and Judge Corley entered. Under the ESI Protocol, TAR is completely voluntary. The Protocol states: “The producing party will disclose to the receiving party if they intend to use [TAR] to filter out non-responsive documents. The parties will meet and confer at that time to negotiate a suitable TAR protocol.” Dkt. 416 at 6 n.1.

This language places the decision of whether to use TAR in the hands of the producing party; if the producing party elects to use TAR to filter out non-responsive documents, it must meet and confer about a protocol. Facebook initially suggested the parties adopt an industry-standard TAR process to reduce its discovery burden by removing non-responsive documents from its review set. After Plaintiffs repeatedly demanded a TAR process that would impermissibly intrude on Facebook’s review processes and work product, Facebook retracted its election to use TAR to filter out non-responsive documents and opted for human review instead. Nothing in the ESI Protocol allows Plaintiffs to challenge or second-guess that decision.

### **B. The Case Law Unanimously Rejects Plaintiffs’ Request For An Order Compelling TAR**

Every court to have considered this issue has concluded a producing party cannot be forced to use TAR against its wishes. “[W]here a producing party wants to utilize TAR . . . courts will permit it.” *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 127 (S.D.N.Y. 2015). But “where the requesting party

has sought to force the producing party to use TAR, the courts have refused.” *Id.* at 127 n.1. Facebook is not aware of any case where a court compelled a party to use TAR over its objection.

*Hyles v. New York City* is instructive. In that case, the plaintiff urged the court to require the City of New York to use TAR to expedite discovery in a case that had been pending for six years. Judge Peck—a vocal proponent of TAR—explained: “The key issue is whether, at plaintiff[’s] request, the defendant . . . can be forced to use TAR . . . . The short answer is a decisive ‘NO.’” 2016 WL 4077114, at \*1 (S.D.N.Y. Aug. 1, 2016). Judge Peck elaborated: “If our focus were on paper discovery, we would not . . . be dictating to a party the manner in which it should review documents for responsiveness or privilege.” *Id.* (quoting *Dynamo Holdings Ltd. P’ship v. Comm’r of Internal Revenue* 143 T.C. 9, 2014 WL 4636526 at \*3 (2014)). He concluded, “the Court would have liked the City to use TAR in this case. But the Court cannot, and will not, force the City to do so.” *Id.* at \*3.

The court reached the same conclusion in *In re: Viagra*, observing the plaintiffs were not able to “cite to any case law in support of their proposal to require [the defendant], over its objection, to use TAR and/or predictive coding” and that “no court has ordered a party to engage in TAR and/or predictive coding over the objection of the party.” 2016 WL 7336411, at \*1. The court explained “it is not up to the Court, or the requesting party . . . to force the . . . responding party to use TAR,” nor is it “clear on what basis the Court could compel [a party] to use a particular form of ESI [review].” *Id.*

Courts throughout the country have consistently reached the same conclusion. *See, e.g., In re Bridgepoint Educ., Inc.*, 2014 WL 3867495, at \*4 (S.D. Cal. Aug. 6, 2014) (denying request to compel defendants to use “predictive coding software”); *Hastings v. Ford*, 2021 WL 1238870, at \*3 (S.D. Cal., April 2, 2021) (“To the extent Plaintiff is seeking to compel Defendants to conduct discovery as directed by Plaintiff, the Court declines.”); *In re Biomet M2a Magnum Hip Implant Prods Liability Lit.*, 2013 WL 1729682, at \*2–3 (N.D. Ind. Apr. 18, 2013) (rejecting plaintiffs’ request for defendants to use predictive coding after already using search terms); *Kleen Products LLC v. Packaging Corp. of Am.*, 2012 WL 4498465, at \*5 (N.D. Ill. Sept. 28, 2012) (rejecting request to impose TAR and emphasizing that the producing party is “best situated” to determine how to preserve and produce ESI).

Plaintiffs’ cited authority does not support their request that the Special Master ignore the unanimous view that a producing party cannot be compelled to use TAR over its objections. First,

1 Plaintiffs rely on *Winfield v. City of New York*, No. 15-CV-02536, 2017 WL 5664852 (S.D.N.Y. Nov.  
 2 27, 2017), which in fact supports Facebook’s position. In *Winfield*, the plaintiff did not ask the court  
 3 to compel TAR. “[T]he Plaintiffs object[ed] to the [defendant’s] continued use of its TAR system.”  
 4 *Id.* at \*10-11. Even though the court found the defendant had incorrectly withheld at least 20 responsive  
 5 documents, it dismissed the plaintiffs’ objection to the defendant’s TAR process: “[T]he producing  
 6 party is in the best position to ‘evaluate the procedures methodologies, and technologies appropriate  
 7 for preserving and producing their own [ESI].’” *Id.* at 9. The court wrote: “[T]here is nothing so  
 8 exceptional about ESI production that should cause courts to insert themselves as super-managers of  
 9 the parties’ internal review processes, including the training of TAR software, or to permit discovery  
 10 about such process, in the absence of evidence of good cause such as a showing of gross negligence in  
 11 the review and production process, the failure to produce relevant specific documents known to exist  
 12 or that are likely to exist or other malfeasance.” *Id.* at \*9.

13 Plaintiffs say *Winfield* supports compelling TAR because, in reciting the history of the dispute,  
 14 the Court wrote: “[G]iven the volume of documents collected, this Court directed the City to complete  
 15 linear review as to certain custodians and begin using [TAR] to hasten the identification, review, and  
 16 production of documents responsive to Plaintiffs’ document requests.” *Id.* at \*4. While Courts may  
 17 order parties to do things they agreed or stipulated to do, there is no indication that the defendant in  
 18 *Winfield* objected to use TAR in this manner. Indeed, the *Winfield* docket reveals the origin of TAR in  
 19 that case; at a hearing seven months before the order Plaintiffs cite, the Court asked the City’s counsel  
 20 about the possibility of using TAR: “I know from past experience [search strings] can sometimes bring  
 21 in too many documents that aren’t necessarily relevant . . . Will the City be able to use prioritization  
 22 software in their review?” Trans. of Hr’g on Disc. Issues at 16: 6-10, No. 15-CV-02536 (S.D.N.Y.  
 23 April 4, 2017), Dkt. 107. Far from objecting, the City’s counsel responded: “[W]e are exploring that  
 24 software and we have used it in the past. So, we’re exploring what would be the most appropriate for  
 25 this case.” *Id.* at 16: 12-14. The Court responded: “It’s not always appropriate in every review but if  
 26 it is appropriate in this review it can accelerate the review process.” *Id.* at 16: 15-17.

27 Plaintiffs next rely on minutes from a hearing in *Independent Living Center of Southern*  
 28 *California v. City of Los Angeles*. The dispute before the Court was “whether quality assurance testing

1 should be used to test the reliability of” a TAR system the defendant was utilizing. Min. of Tel. Conf.  
 2 at 2, No. 2:12-cv-551-FMO (PJW) (C.D. Cal. June 26, 2014), Dkt. 375. As in *Winfield*, in reciting the  
 3 history of the dispute, the Court stated: “the Court ordered the City to use predictive coding to locate  
 4 the most relevant documents.” *Id.* at 1. Again, there is no indication that the Court ordered TAR over  
 5 the City’s opposition. The docket indicates the Court held multiple telephonic hearings “to discuss . . .  
 6 the possibility of shifting to a predictive coding approach for Defendants’ future productions.” Min.  
 7 of Tel. Conf. at 1, No. 2:12-cv-551-FMO (PJW) (May 30, 2014), Dkt. 360; *See also* Min. of Tel. Conf.,  
 8 2:12-cv-551-FMO (PJW) (Jun. 11, 2014), Dkt. 367; Min. of Tel. Conf., 2:12-cv-551-FMO (PJW)  
 9 (June. 13, 2014), Dkt. 371. Nothing in the record for this case suggests the City opposed doing so.

10 Finally, Plaintiffs say *EORHB, Inc. v. HOA Holdings LLC* supports their demand that the  
 11 Special Master require TAR. In that case, the Delaware Court of Chancery told the parties at a hearing:  
 12 “[T]hese types of indemnification claims can generate a huge amount of documents . . . I would really  
 13 encourage you all, instead of burning lots of hours with people reviewing [to use predictive coding].”  
 14 Trans. of Oral Arg. at 67: 7-13, Del. Ch. No. 7409, Laster, J. (Oct. 19, 2012), Dkt. 112. The parties  
 15 later agreed that the defendants would use TAR and the plaintiffs—at their election—would use  
 16 “traditional methods” instead. *See* 2013 WL 1960621, at \*1 (Del. Ch. May 6, 2013).

17 The case law is clear: a party cannot be ordered to use a TAR process over its objection. The  
 18 Special Master can and should deny Plaintiffs’ motion for this reason alone.

### 19 **C. Plaintiffs Offer No Justification For Their Request For An Unprecedented Order**

20 Plaintiffs largely use their brief to make extraneous accusations against Facebook. Because the  
 21 complaints Plaintiffs raise are false, we respond below. In doing so, we emphasize that none of the  
 22 issues Plaintiffs raise is relevant to this dispute; even if any were true, none (singularly or collectively)  
 23 would justify Plaintiffs’ demand that the Special Master depart from the sound reasoning of every court  
 24 to have considered this issue by compelling Facebook to use TAR over its objection.

#### 25 **1. Facebook’s Prior Exploration Into TAR Does Not Provide A Basis To Order** 26 **Facebook To Use A TAR Process Over Its Objection**

27 Plaintiffs argue the Special Master should force Facebook to use TAR because Facebook  
 28 attempted to negotiate a TAR protocol with Plaintiffs. Of course, there is no authority indicating a

1 party should be forced to use a TAR process because it unsuccessfully attempted to reach a TAR  
2 agreement. Plaintiffs' argument also paints a misleading picture.

3 After negotiating search strings for an entire year, Facebook explored ways it could expedite  
4 its review. Days after the parties entered a stipulation resolving their search-string disputes, Dkt. 649,  
5 Facebook wrote: "Facebook is seeing an unusually high volume of plainly non-responsive materials . . .  
6 Facebook will assess the extent to which the completion of its review can be expedited by applying  
7 Technology Assisted Review to filter out nonresponsive documents." Dkt. 650 at 9. Plaintiffs  
8 objected: "[I]t is Plaintiffs' position that the strenuously negotiated search terms provide sufficient  
9 limits as to the universe of relevant documents . . . all documents surfaced by running the terms against  
10 the custodial collections . . . should be promptly produced." *Id.* at 2. Judge Corley dismissed Plaintiffs'  
11 request stating: "Facebook raised an issue of there being a lot of nonresponsive hits. [T]hat may . . .  
12 be something that [the discovery mediator] could work with all the parties in coming up with something  
13 that maybe reduces that that everyone's comfortable with." Apr. 6, 2021 Trans. at 9:20-23.

14 Facebook then raised TAR in mediation. Facebook explained TAR might make its review  
15 faster, less costly, and more efficient, but that lengthy negotiations would undercut that goal. *See infra*  
16 at 7. Ultimately, the parties were not able to reach agreement on even the fundamentals of how a TAR  
17 process would work. Throughout the Parties' TAR negotiations, Plaintiffs said they would agree to  
18 TAR only if Facebook implemented a series of non-negotiable requirements that would *complicate and*  
19 *delay*—not advance—document discovery. Indeed, Plaintiffs made clear they would only agree to a  
20 TAR process that allowed them to inject onerous conditions into every stage of Facebook's review,  
21 allow Plaintiffs to micromanage and challenge each step of Facebook's review, and permit Plaintiffs  
22 access to privileged and non-responsive documents. *See* Plaintiffs' TAR Proposal (Plaintiffs' Ex. 14).  
23 Throughout the parties' TAR mediations, Plaintiffs demanded participation in the drafting of  
24 Facebook's document review protocol, and the ability to seek the Court's intervention if Facebook did  
25 not accept Plaintiffs' edits. Plaintiffs demanded the right to participate in training and assessing any  
26 TAR model, including by reviewing non-responsive documents. And, Plaintiffs demanded the ability  
27 to litigate disagreements over responsiveness calls made by Facebook as to individual documents.

28 Facebook repeatedly expressed concern both in its written submissions and in several discovery



mediation sessions that the parties were too far apart on the basic principles of a TAR model to justify wasting additional time negotiating the specifics of a written TAR protocol:

- “[T]he efficiencies of TAR will be lost if we invest months negotiating a protocol.” *See* Facebook’s April 29, 2021 Mediation Statement.
- “The efficiencies of using TAR will be lost . . . if the parties spend months negotiating and even potentially litigating aspects of a TAR protocol or if Plaintiffs will only agree to cumbersome processes intended to convert TAR into a litigation sword and added source of delay— rather than a tool to streamline document review.” *See* Facebook’s May 6, 2021 Mediation Statement.
- “[Facebook] hopes the parties will be able to come to ground quickly (within one-to-two sessions) on whether they are on the same page about a TAR model, the types of metrics and validation that will be shared with Plaintiffs, and the purpose TAR should serve.” *Id.*

For this reason, Facebook suggested the parties refrain from drafting full TAR proposals and instead exchange term sheets outlining what they expected to see in a TAR protocol to determine if the parties could reach a common understanding on the basic principles first. Plaintiffs instead drafted a detailed protocol based on their unilaterally designed TAR model.

With the mediators’ assistance, Facebook determined the parties would not be able to reach a TAR agreement and it could only meet the substantial completion deadline if it focused its efforts on its prioritized manual review process, supported by analytics. Before the parties’ negotiations even advanced far enough for Facebook to propose a TAR protocol, Facebook told Plaintiffs it would no longer be pursuing the possibility of using of TAR to filter non-responsive documents out of its review.

Nothing about Facebook’s suggestion that the parties explore the possibility of a TAR agreement justifies Plaintiffs’ demand that the Special Master *impose* a TAR process that would unwind months’ of work, increase Facebook’s costs, and further delay this case. *See infra* at 14-15. Facebook also notes it has invested more attorney hours litigating Plaintiffs’ unfounded demand for a TAR order (to Judge Corley and now here) than Plaintiffs say they invested developing a TAR protocol.

## **2. TAR Is Not Required Under The Northern District’s Guidelines**

Plaintiffs next argue the Special Master should compel TAR because Facebook is “uncooperative,” and the Northern District’s *Guidelines for the Discovery of Electronically Stored Information* require cooperation and transparency. Cooperation and transparency do not require TAR—if they did, it would be required in all cases. Lacking any legal basis for their demands,

1 Plaintiffs resort to baseless and irrelevant accusations against Facebook.

2 Facebook has gone to great lengths to cooperate in a grueling discovery process for two years,  
3 and Judge Corley has rejected Plaintiffs' complaints that Facebook is uncooperative. Facebook has  
4 produced 1.9 million pages of documents. For one year, Facebook met and conferred with Plaintiffs  
5 for two hours, twice each week, during which Facebook answered hundreds of informal requests.  
6 Facebook has gone out of its way repeatedly to provide Plaintiffs with information to facilitate  
7 cooperative discussions. To facilitate custodian negotiations, Facebook even *created* new  
8 documents—reporting line charts for the employees at issue. Dkt. 400 at 11, 16. To facilitate  
9 discussions about ESI, Facebook gave detailed presentations about its two core systems (Graph and  
10 Hive). Dkt. 428 at 8. To assist Plaintiffs in crafting discovery requests, Facebook wrote Plaintiffs  
11 lengthy explanations of how its systems operate. *Id.* at 6. Facebook has also made enormous efforts  
12 to reach negotiated compromises, and when the parties cannot resolve issues, it works hard to narrow  
13 disputes. For instance, of the 82 custodians selected for this case, Facebook litigated 9. Dkt. 431. Of  
14 the more than 140 search strings, Facebook litigated 23. Dkt. 553; *see also* Dkt. 654.

15 Plaintiffs previously argued to Judge Corley that Facebook has been uncooperative in ESI  
16 discussions and asked Judge Corley to order “written ESI disclosures” or a 30(b)(6) ESI deposition as  
17 a remedy. Dkt. 428 at 5. Judge Corley rejected these accusations and arguments. “On the ESI  
18 disclosures, I’m not going to require any more – I’m not going to do what the plaintiffs proposed . . .  
19 I’m not satisfied there’s anything more in particular you need.” May 15, 2020 Trans. at 6:16-22. **“The**  
20 **Court is not ordering any further general ESI discussions at this time.”** Dkt. 436

21 With respect to transparency, there is no black box around Facebook’s view of relevancy.  
22 Facebook has been crystal clear that pages 6 to 10 of Judge Chhabria’s motion to dismiss order (Dkt.  
23 298)—which describe the four theories of alleged misconduct that Judge Chhabria allowed to move  
24 forward—are Facebook’s “relevancy North Star.” If a responsive document relates in any way to friend  
25 sharing or the “whitelisting,” “business partner,” or “enforcement” theories Judge Chhabria described,  
26 Facebook finds it relevant. Facebook also offered to discuss interim deadlines to assure Plaintiffs that  
27 it will not provide a “document dump,” at the end of the discovery period, *see* Dkt. 631-3 at 10, and  
28 Judge Corley suggested such an agreement would be a suitable resolution to this dispute. Dkt. 712.



To that end, Facebook has made ongoing rolling productions, at least once each month, and provides more detail about the status of its review below.

Facebook has gone above and beyond to cooperate with Plaintiffs, notwithstanding Plaintiffs' ongoing efforts to weaponize discovery in this case—not to obtain facts—but to impose costs and burdens and preclude a timely resolution on the merits. Nothing about the cooperation and transparency described in the Northern District's *Guidelines for the Discovery of Electronically Stored Information* justifies or authorizes Plaintiffs' demand for an order compelling Facebook to use TAR.

### **3. Plaintiffs Identify No Deficiencies In Facebook's Productions**

Plaintiffs next argue the Special Master should compel TAR because Facebook's productions are deficient. Again, every court to have considered whether a party can be compelled to use TAR over its objection has answered with "a decisive 'NO.'" *Hyles*, 2016 WL 4077114, at \*1. Even where parties have sought a lesser degree of oversight over a party's review, courts have declined in the "absence of evidence of good cause such as a showing of gross negligence in the review and production process, the failure to produce relevant specific documents known to exist or that are likely to exist or other malfeasance." *Winfield*, at \*9. Plaintiffs cannot even come close to satisfying that standard.

Plaintiffs' argument that Facebook's productions are deficient boils down to an observation that fewer documents have been produced in this case than in certain other lawsuits. The number of documents produced in unrelated cases has nothing to do with whether Facebook is completing its document review in good faith. While there no doubt have been cases in which more documents have been produced, the volume of documents produced in this case far exceeds the vast majority of lawsuits. Of course, that is beside the point. The search strings the parties negotiated and Judge Corley ordered yield approximately 5.6 million documents for Facebook to review for responsiveness, relevance, and privilege, so the Court surely did not expect Facebook to produce 7.5 million documents (as Plaintiffs say were produced in *Juul*) or even 5.5 million (as Plaintiffs say were produced in the opioids case).

Plaintiffs point to no actual deficiencies in Facebook's productions (which are ongoing). "A plaintiff's mere suspicion that additional documents must exist is an insufficient basis to grant a motion to compel," *Bresk v. Unimerica Ins. Co.*, No. CV 16-8893 ODW (SSX), 2017 WL 10439831, at \*5 (C.D. Cal. Nov. 16, 2017)—much less to take the extraordinary step of imposing TAR over a party's

objection while its review is ongoing. Facebook addresses several pertinent points below.

**a. Facebook Reproduced Productions From 10 Government Matters**

Before the parties even began search string negotiations, Facebook produced the Facebook documents it produced in response to the FTC’s document requests during its related investigations—including its investigation stemming from Cambridge Analytica. Plaintiffs have argued the theories at issue in this case are the same theories the FTC investigated, Dkt. 388-2 at 2, and Judge Chhabria expected the documents that were sufficient for the FTC, “**would cover the vast majority of the documents that the Plaintiffs would want in this litigation.**” March 5, 2020 Hr’g Tr. at 4:14-15.

It is difficult to conceive how Plaintiffs could argue Facebook committed some sort of discovery “malfeasance” or “gross negligence,” when Facebook provided Plaintiffs—who are private parties—the same materials that the company’s primary regulator found sufficient to investigate the same conduct. Facebook also produced responsive documents from the document productions it provided to *nine* other government entities in related matters. All subsequent productions in this case were intended to *supplement* Facebook’s government productions. To date, Facebook has produced **1,959,618** pages over 45 productions, in addition to more than **500 pages** of interrogatory responses.

**b. Facebook Is On Track To Meet the Substantial Completion Deadline**

Facebook has nearly 100 attorneys reviewing documents. Once Facebook determined it would not use TAR to filter out nonresponsive documents, many reviewers began working overtime. Facebook has also used analytics to front-load likely responsive documents to the beginning of the review queue, and the documents that have not yet undergone a first-level review are not as likely to be responsive. Facebook has now completed the majority of its review process, and is on track to meet the January substantial completion deadline. As discussed more below, injecting a TAR protocol at this stage into Facebook’s already enhanced and efficient linear review process would waste time and resources and delay the substantial completion deadline.<sup>1</sup>

**c. The size of Facebook’s Productions Do Not reflect the Pace of Review**

Plaintiffs complain that Facebook’s productions are smaller than they would like. This is a

<sup>1</sup> To the extent the Special Master would like additional information about the current stage of review, Facebook is happy to provide additional information *in camera*.

product of Plaintiffs' boundless approach to discovery. The volume of Facebook's productions reflects (i) a low responsiveness rate for the negotiated search string yield and (ii) that many relevant documents in the review set are duplicates of documents Facebook produced in its government productions.

At Plaintiffs' insistence, Facebook ran more than 140 extraordinarily overbroad search strings. Facebook submitted these strings with its April 29 mediation statement; a few examples are also below. As the Special Master will see, the strings capture things like any document over more than ten years from 26 custodians that includes any iteration of "problem" within five words of access\* or polic\*.

ID	String	Custodians
FB-24	((misus* OR abus* OR violat* OR risk* OR leak* OR problem*) w/5 (access* OR "personal information" OR PII OR (friend* w/2 data) OR rule* OR TOS* OR "un TOS" OR "Non-TOS" OR untos* OR nontos* OR polic* OR term*))	26
FB-25	((("3d part*" OR 3P* OR "3rd part*" OR app OR apps OR application OR applications OR BP* OR dev* OR devs OR developer OR developers OR partner OR partners OR partnership OR partnerships OR affiliat* OR "third part*" OR client* OR entity OR entities OR customer* OR "Platform User*" OR "tier 0" OR "tier 1" OR T0 OR T1 OR vendor* OR (device w/2 manufacturer*) OR (device w/2 integrat*) OR (device w/2 maker*) OR (mobile w/2 partner*) OR (mobile w/2 manufacturer*)) w/5 (GDP OR perms OR permission* OR whitelist* OR "whit* list" OR whitelist*) w/5 (misus* OR abus* OR risk* OR leak* OR problem* OR breach*))	49

The strings were run on dozens of custodians' files over more than 10 years, even if intended to target discrete time periods. For instance, one of the live theories is about alleged "whitelisting" that occurred for approximately one year around 2015. But Plaintiffs demanded that the whitelisting strings be run on documents from 2007 through 2019, which yielded scores of non-responsive documents.

As a result of the overbroad search strings, Facebook is finding an unusually high volume of clearly non-responsive materials: e.g. out-of-office messages, resumes, spam, advertisements, reimbursement emails, hiring assessments, flight confirmations, information about events Facebook hosted, documents about providing free internet in developing countries, individual employees' investment materials—and, on one occasion, even a .pdf of a book about meditation. Given Plaintiffs' year-long demand for egregiously overbroad search strings, they cannot now argue that the low responsiveness rate suggests a problem with Facebook's review.<sup>2</sup>

The ESI protocol further requires Facebook to exclude from its productions materials it already produced, Dkt. 416 at 9, 10; Dkt. 416 Ex. A at 6, and Facebook produced many of the relevant materials

<sup>2</sup> It is the very reason Facebook fought so hard to more narrowly tailor the search strings.

1 in this review set through its government productions. This duplication should come as no surprise.  
 2 Most custodians in this case were also custodians in the government matters, and several search strings  
 3 are nearly identical to or overlap with strings that were used in those investigations and litigations.

4 **d. The Parties Have Had Extensive Negotiations About Non-Custodial Data**

5 First and foremost, the parties' negotiations about *targeted* collections from non-custodial data  
 6 sources has nothing to do with whether TAR should be run on Facebook's review population. In any  
 7 case, Facebook has not been "unwilling" to discuss non-custodial data. As Judge Corley  
 8 acknowledged, the parties spent dozens of hours meeting and conferring about non-custodial data. On  
 9 this basis, Judge Corley denied Plaintiffs' demand for written ESI disclosures and a 30(b)(6) deposition  
 10 about non-custodial data sources. *See supra* at 8. The parties even negotiated a schedule for production  
 11 of certain non-custodial data that Facebook satisfied in July 2020. Plaintiffs rejected Facebook's  
 12 suggestion that the parties negotiate a schedule for other non-custodial requests.

13 Plaintiffs recently raised certain data sources they describe as "non-custodial" in mediation. As  
 14 Facebook explained, Quip and Tasks are *custodial* sources; Facebook is reviewing them currently.  
 15 Privatron is a tool to locate certain Tasks. Scuba is not a data source; it is primarily a tool to analyze  
 16 data. Facebook already produced certain Hive data and met and conferred extensively with Plaintiffs  
 17 about Hive, which holds structured data not amenable to review in Relativity and is not a candidate for  
 18 TAR. Facebook has repeatedly asked Plaintiffs to identify what data they seek from Hive, and it is  
 19 mediating a dispute regarding the only Hive data Plaintiffs specifically requested (API call logs).

20 **e. The ESI Protocol Requires Facebook To Produce Embedded Images As**  
 21 **Separate Records**

22 Finally, Plaintiffs say Facebook's productions are deficient because they include many  
 23 embedded images. The ESI Protocol *requires* Facebook to process and produce embedded files "as  
 24 independent document records." Dkt. 416 ¶ F. Plaintiffs insisted on this provision. Again, Plaintiffs  
 25 are complaining about a consequence of an unnecessary burden they imposed.

26 Plaintiffs' general gripes with the volume of Facebook's productions fall woefully short of  
 27 justifying their demand that the Special Master issue an unprecedented order compelling TAR.  
 28

#### 4. The Court Does Not Consistently “Side with Plaintiffs”

Because there is no legal support for Plaintiffs’ demand, Plaintiffs next say TAR is needed to monitor Facebook’s relevancy determinations because “each time a particular disagreement is adjudicated, the Court sides with Plaintiffs.” To support this egregiously false statement, Plaintiffs cite a hearing transcript and two orders out of context.

First, Plaintiffs note that at a CMC in March 2020—before Facebook made its government productions or the parties even began negotiating search strings—Judge Chhabria reminded Facebook that this is a large case. Plaintiffs ignore that at the same hearing, Judge Chhabria told Plaintiffs he expected Facebook’s FTC productions “would cover the vast majority of the documents that the Plaintiffs would want in this litigation.” *Id.* at 4:14-15. At the same hearing, Judge Chhabria also denied Plaintiffs’ demand that Facebook log materials it may withhold on the basis of relevance, explaining Facebook “would never be required to do a log of the stuff that they pulled out [of a production] and determined was irrelevant or non-responsive to your request.” March 4, 2020 Hr’g Tr. at 8:7-10. Judge Chhabria has declined to “side with Plaintiffs” on several other occasions.<sup>3</sup>

Plaintiffs are also wrong that Judge Corley’s orders with respect to user data and “Business Partners” somehow show Facebook’s productions are deficient. Judge Corley *rejected* Plaintiffs’ contention that Facebook was relying on an inappropriate definition of “Business Partners”: “The Court fails to see any material difference between the Parties’ definitions [of Business Partners].” Dkt. 608 at 2. Judge Corley also did not hold that Facebook failed to produce relevant user data—she said the data relevant to this case is “sensitive data,” including data falling in the categories Plaintiffs note, ***to the extent it was “shared” with third parties.*** Dkt. 557 at 2. Facebook confirmed to Plaintiffs that the productions it made six months before Judge Corley issued this ruling satisfy its obligations under her order. Judge Corley has declined to “side with” Plaintiffs on various other issues.<sup>4</sup>

<sup>3</sup> See Dkt. 298 at 6-10 (narrowing 1440 paragraph complaint to four theories); Dkt. 571 (granting motion to dismiss claims by non-U.S. users); Dkts. 362, 374 (denying motions to compel).

<sup>4</sup> See e.g. Aug. 14, 2020 Hr’g Tr. 4:5-9 (requiring Plaintiffs to narrow hundreds of search strings to 50 they would be allowed to brief); Sept. 25, 2020 Hr’g Tr. 9:4-16 (rejecting Plaintiffs’ position that all search strings should be run across all custodians); see Dkt. 650 at 2; Apr. 6, 2021 Hr’g Tr. 9:20-23 (rejecting Plaintiffs’ demand that Facebook turn over all documents hitting on search strings without review); Jan. 15, 2021 Hr’g Trans. at 17:12-13 (quashing 30(b)(6) deposition notice); May 15, 2020 Trans. at 6:16-22 (rejecting request for ESI deposition); Dkt. 716 (rejecting demand that Facebook de-designate as confidential materials leaked by a third party); see Dec. 9, 2020 Hr’g Tr. at 48:8-11; Dkt. 588 at 2 (denying request to make Facebook’s CEO and COO custodians).

1 Plaintiffs do not and cannot point to a single ruling in this case even suggesting Facebook  
 2 engaged in some misconduct, and even if they could, that would justify an unprecedented ruling  
 3 compelling TAR. Once again, Plaintiffs' argument that TAR is needed to oversee Facebook's  
 4 relevance determinations exposes Plaintiffs' motive: to weaponize TAR in an effort to slow discovery,  
 5 increase costs, and demand a seat at Facebook's document-review table.

6 **D. Imposing A TAR Process Now Would Delay Discovery**

7 Plaintiffs' demand that the Special Master compel TAR would also be counterproductive. It is  
 8 clear Plaintiffs do not seek TAR to expedite Facebook's review or reduce review costs, but instead to  
 9 create a vehicle for Plaintiffs to litigate relevancy disputes. Litigating document-by-document disputes  
 10 in the context of TAR is not an efficient or effective discovery process, and Judge Chhabria has already  
 11 advised Plaintiffs that they are not entitled to micromanage Facebook's review. *See supra* at 13; *see*  
 12 *also Aurora Cooperative Elevator Co. v. Aventine Renewable Energy-Aurora West, LLC*, 2015 WL  
 13 10550240 at \*2 (D. Neb. Jan. 6, 2015) (courts will not require parties to "sit in adjoining seats while  
 14 rummaging through millions of files" that include non-responsive documents.). If a dispute arises  
 15 about materials Plaintiffs identify as missing from Facebook's productions, the parties should mediate  
 16 it and, if they are not able to resolve it, file an appropriate motion. TAR is a useful and effective tool  
 17 when it creates efficiencies. TAR is not effective or worthwhile when it creates unnecessary disputes.

18 It is also too late for Facebook to implement an effective TAR process without significantly  
 19 delaying its review and duplicating completed work. Five months ago, Facebook hoped it would be  
 20 able to use an industry-standard TAR process to remove non-responsive documents from its review  
 21 set. After it became clear that the parties would not reach a stage where they could even begin to  
 22 successfully negotiate a TAR protocol, Facebook increased the size of its review team, authorized  
 23 overtime for its reviewers, and implemented tools to prioritize its review. Facebook has now completed  
 24 its first-level human review of more than two-thirds of the documents that are most likely responsive.  
 25 And because Facebook used analytics to prioritize its review, samples of unreviewed documents appear  
 26 to have a responsiveness rate of approximately 3%. Given its low richness, this remaining unreviewed  
 27 population would likely be excluded from review by TAR, and any order that requires running TAR  
 28



on documents already manually reviewed would waste months' of work and cause significant delays.

Facebook's review continues to progress every day (including weekends), and is on pace to meet the substantial completion deadline. An order requiring Facebook to upend the review it has been conducting for the last year and to set up a new review process just four months before the substantial completion deadline is entirely impractical—particularly given Plaintiffs' suggestion that any TAR process should allow for document-by-document disputes. Plaintiffs seek delay, not forward progress.

#### **E. The Special Master Should Strike Section IV.C Of Plaintiffs Motion**

Consistent with the Special Master's instructions, Facebook does not respond to the points made in Section IV.C of Plaintiffs' Motion—"The Special Master Should Enter a TAR Protocol Designed to Meet the Needs of This Case." Facebook respectfully requests that the Special Master strike this section, along with Plaintiffs' TAR proposal and the declaration of Kelly Twigger. The Special Master confirmed the only issue at impasse is whether Facebook should be compelled to use TAR. He told the parties not to brief what any TAR protocol would look like and advised that he intended to "redline" any briefing going beyond the impasse topic. Plaintiffs ignored this instruction by attaching a proposed TAR protocol to their submission supported by a 7-page declaration from their hired legal consultant.

Ms. Twigger's declaration is also improper because it provides extended advocacy for Plaintiffs' desired outcome. This violates: (i) Local Rule 7-5(b), which limits the contents of declarations to facts and does not permit legal arguments or conclusions; (ii) Section 3 of the Special Master's Dispute Protocol, which prohibits "argument" in declarations and footnotes; and (iii) Federal Rule of Evidence 702, which precludes experts from providing legal opinions or conclusions.

Facebook reserves all arguments regarding Plaintiffs' proposed TAR process and the right to propose its own TAR process, should the Special Master compel TAR over Facebook's objection.

#### **CONCLUSION**

Facebook respectfully asks the Special Master to deny Plaintiffs' motion, which asks the Special Master compel a TAR process in violation of the ESI Protocol, the Court's instructions, and the sound reasoning of every other Court to have considered this issue, and would serve only to encourage disputes and further delay a resolution of this case on the merits.

1 Dated: September 9, 2021

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

IN RE: FACEBOOK, INC. CONSUMER  
PRIVACY USER PROFILE LITIGATION

MDL No. 2843  
Case No. 18-md-02843-VC-JSC

This document relates to:  
  
ALL ACTIONS

**PLAINTIFFS' REPLY BRIEF  
REGARDING THE USE OF  
TECHNOLOGY-ASSISTED REVIEW**

Judge: Hon. Vince Chhabria  
Hon. Jacqueline Scott Corley  
Special Master Daniel Garrie  
Courtroom: 4, 17th Floor

JAMS Ref. No.: 1200058674

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<i>Kleen Prods. LLC v. Packaging Corp. of Am.</i> , 2012 WL 4498465, at *5 (N.D. Ill. Sept. 28, 2012).....	7
<i>Unigard Sec. Ins. Co. v. Lakewood Eng'g &amp; Mfg. Corp.</i> , 982 F.2d 363, 368 (9th Cir. 1992).....	7
<i>Winfield v. v. City of New York</i> , 2017 WL 5664852 (S.D.N.Y. Nov. 27, 2017) .....	4, 5

**Rules**

Fed.R. Civ.P. 26(c)(1)(B).....	7
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**Treatises**

8A FEDERAL PRACTICE AND PROCEDURE § 2035 (3d ed. 2021) .....	7
8A FEDERAL PRACTICE AND PROCEDURE § 2038 (3d ed. 2021) .....	7

**Articles**

Maura R. Grossman & Gordon V. Cormack, <i>E-Discovery Bulletin: Continuous Active Learning for TAR</i> , Thomson Reuters Practical Law (April/May 2016) .....	2
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## I. INTRODUCTION

Plaintiffs proposed TAR as a tool to address two longstanding issues impeding the progress of this litigation. First, Facebook’s manual document review is too slow to meet the needs of the case. Second, TAR can be used to surface and resolve the longstanding, entrenched dispute regarding relevance.

A few months ago, Facebook thought TAR would solve the first issue. Plaintiffs’ opening brief recounts Facebook’s repeated statements advocating for TAR as a tool to make its document review more efficient, which would benefit all parties by enabling them to complete document discovery more quickly. Facebook’s former arguments make sense. Facebook’s opposition makes clear that it is the second issue, relevance, that resulted in its about-face: “Plaintiffs admit they want this detour”—TAR—“for the improper purpose of challenging Facebook’s relevance determinations on a document-by-document basis.” Facebook’s Opposition (Opp.) at 1-2.

Plaintiffs make no such admission. Plaintiffs do *not* want to spend time challenging Facebook’s relevance determinations document by document. Rather, Plaintiffs have stated that Facebook’s definition of relevance is improperly narrow, and that it has not cooperated “on issues relating to the preservation, collection, search, review, and production of ESI,” as expected by the Northern District’s *Guidelines for the Discovery of Electronically Stored Information* (“*Guidelines*”). How have Plaintiffs drawn the conclusion that Facebook is defining relevance improperly? The Court has told it so, repeatedly. Judge Chhabria said “a number of times on the record” that Facebook has taken “an unduly narrow view of what should be turned over to the Plaintiffs.” And Judge Corley disagreed with Facebook’s definition of the scope of relevant named plaintiffs’ data and business partners. Despite this repeated and consistent feedback, Facebook’s definition of relevance has remained unchanged.

Regardless, Facebook presents a false choice: Plaintiffs’ proposed TAR protocol or no TAR at all. While Plaintiffs believe their proposal is fair and appropriately responds to the challenges of this case, they have repeatedly stated that they would accept a mediator’s or Special Master’s TAR proposal sight unseen. The Special Master is an ESI expert, is familiar with the case, and has engaged in numerous communications with the parties concerning TAR. He is

1 uniquely well-situated to implement an appropriate TAR protocol for this case's needs with an  
2 eye to ensuring compliance with the case management schedule.

3         Given its reversal on TAR, how does Facebook now propose to resolve the first issue: the  
4 slow pace of production? It denies that it is an issue at all, saying it is now on track to meet the  
5 substantial completion deadline. Opp. at 10. That is a curious representation. In the before-times,  
6 when Facebook was insisting on TAR, there was no operative case management schedule. Since  
7 then, Judge Chhabria has issued a scheduling order requiring substantial document production to  
8 be complete by January 31, 2021. Notably, Facebook says now that it is using "an efficient,  
9 prioritized" review "process supported by analytics." Opp. at 1. The mention of "analytics" is  
10 troubling. It is not defined further, and suggests that Facebook may have implemented TAR, or  
11 something approaching it, after pulling out of the parties' negotiations over a suitable TAR  
12 protocol. This would violate the ESI Order. Dkt. No. 416 at 5-6 & n.1.

13         Plaintiffs remain convinced that a TAR protocol, appropriately implemented, is the tool  
14 best situated to increase production and efficiently surface (and resolve) foundational disputes  
15 about relevance. *See* Maura R. Grossman & Gordon V. Cormack, *E-Discovery Bulletin:*  
16 *Continuous Active Learning for TAR*, Thomson Reuters Practical Law (April/May 2016) (using  
17 continuous active learning with a TAR tool can "minimize the potential for disputes with  
18 requesting parties").<sup>1</sup> Facebook asserts two reasons the Special Master can't implement TAR  
19 against Facebook's wishes.

20         **First**, Facebook asserts the ESI protocol forecloses Plaintiffs' request. Not so. The ESI  
21 protocol provides that it "may be modified . . . by the Court." Dkt. No. 416 at 11.

22         **Second**, Facebook asserts that the caselaw unanimously rejects Plaintiffs' request for an  
23 order compelling TAR in these circumstances. Again, no. The caselaw is split on the issue, driven  
24 by the particular facts of each case, and none of it is binding. The cases where courts have  
25 compelled TAR bear striking resemblance to the facts here. And in none of those cases is there  
26  
27

28 <sup>1</sup> Available at [https://plg.uwaterloo.ca/~gvcormac/caldemo/AprMay16\\_EdiscoveryBulletin.pdf](https://plg.uwaterloo.ca/~gvcormac/caldemo/AprMay16_EdiscoveryBulletin.pdf).

1 evidence that the resisting party flipfopped on the issue as Facebook has here, which puts the  
 2 notion that Plaintiffs' seek to "compel" TAR implementation into a different framework.

3 The rest of Facebook's brief—the substantial majority of it—contends that Plaintiffs have  
 4 not justified the request that the Special Master implement TAR. This portion of the brief raises  
 5 red herrings (*e.g.*, "TAR is not required by the Northern District's Guidelines," an argument  
 6 Plaintiffs never made), meaningless detours ("Facebook Reproduced Productions From 10  
 7 Government Matters," productions that had already been collected and required no review), and  
 8 revisionist history ("The Parties Have Had Extensive Negotiations about Non-Custodial Data,"  
 9 which is simply untrue). Those contentions and others will be addressed briefly below.

## 10 **II. ARGUMENT**

### 11 **A. The ESI Order Does Not Foreclose the Special Master from Ordering** 12 **Facebook to Implement TAR**

13 Facebook first contends that the ESI Order forecloses the Special Master from ordering  
 14 Facebook to implement TAR. Opp. at 2. But the ESI Order states that it may be modified by the  
 15 Court: "This Stipulated Order may be modified [1] by agreement of the parties memorialized in a  
 16 Stipulated Order of the parties or [2] by the Court." Dkt. No. 416 at 11. Plaintiffs' request simply  
 17 asks the Special Master to modify the ESI Order consistent with its terms to facilitate efficient  
 18 production of backlogged discovery to meet the case schedule Judge Chhabria entered. Because  
 19 the Special Master was appointed to "issue a ruling" on "any discovery dispute" not resolved  
 20 through mediation, the Special Master can modify the ESI Order. Dkt. No. 708 at 1.

### 21 **B. The Special Master Has the Authority to Require Facebook to Implement** 22 **TAR**

23 Facebook contends the caselaw uniformly holds that a party cannot be required to  
 24 implement TAR against its wishes. That is not correct. The cases cited in Plaintiffs' opening brief  
 25 hold that a judge, and therefore the Special Master here, may require Facebook to implement  
 26 TAR. Facebook's attempt to distinguish these cases cited is misguided and unsuccessful.

27 Before addressing those cases, however, it is worth noting the case Plaintiffs cite that  
 28 Facebook ignores, *In re Mercedes-Benz Emissions Litig.*, 2020 WL 103975 (D.N.J. Jan. 9, 2020).

1 While that case did not order implementation of TAR over defendants’ objection, it stated that it  
 2 was open to doing so “if Plaintiffs contend that Defendants’ actual production is deficient.” *Id.* at  
 3 \*2. As the Special Master is well aware in his role as a discovery mediator, and as discussed in  
 4 Plaintiffs’ opening brief and again below, that is precisely what Plaintiffs contend here. Thus,  
 5 *Mercedes-Benz* clearly supports the conclusion that the Special Master may require Facebook to  
 6 implement TAR. Facebook’s failure to address *Mercedes-Benz* in its brief is telling.

7 Facebook does address three other cases Plaintiffs rely on: *Winfield v. v. City of New York*,  
 8 2017 WL 5664852 (S.D.N.Y. Nov. 27, 2017), Minute Order, *Independent Living Center of*  
 9 *Southern California v. City of Los Angeles*, CV 12-551-FMO (PJW) (C.D. Cal. June 26, 2014),  
 10 ECF No. 375, and *EORHB, Inc. v. HOA Holdings LLC*, No. 7409-VCL (Del. Ch. May 6, 2013).  
 11 Facebook’s discussion of these cases does not rebut Plaintiffs’ central point: a federal court,  
 12 including a special master duly appointed by a federal court, has the authority to require  
 13 recalcitrant parties to implement TAR.

14 Facebook contends that *Winfield* supports its position because the plaintiffs there objected  
 15 to the City’s continued use of its TAR system. *Id.* at \*9. But that dispute concerned whether TAR  
 16 was adequately trained, not whether it should be implemented. *See id.* (“Plaintiffs contend the  
 17 system is improperly trained” leaving it “unable to recognize and properly categorize responsive  
 18 documents”). *Winfield* did not concern whether to implement TAR, because, given plaintiffs’  
 19 “numerous complaints about the pace of discovery and document review” based on “a set of  
 20 search terms that was heavily negotiated by the parties,” the court had already ordered the City to  
 21 begin using TAR. *Id.* at \*4.

22 Facebook points out that, in a hearing seven months before it ordered the City to  
 23 implement TAR, the court had asked whether ““the City [would] be able to use prioritization  
 24 software in their review?”” and the City responded it had used such software in the past and was  
 25 exploring its use for *Winfield*. Opp. at 4. It is unclear whether the term “prioritization software”  
 26 meant TAR. Indeed, it sounds familiar to the “process supported by analytics” that Facebook only  
 27 now discloses it is using. In any event, Facebook’s point backfires. Even more than the City’s  
 28



1 willingness to explore whether prioritization software would be appropriate, Facebook here  
 2 actively sought permission to use TAR here and repeatedly touted its benefits. Regardless,  
 3 *Winfield* makes clear that the City was not using TAR before it was ordered to do so. *See*  
 4 *Winfield*, 2017 WL 5664852, at \*4 (the City was ordered to collect documents from 50 custodians  
 5 and was applying search terms to electronic documents from them). Just as *Winfield* “directed”  
 6 the City to begin using TAR “to hasten the identification, review, and production of documents  
 7 responsive to Plaintiffs’ document requests,” the Special Master should do so here.  
 8 Regarding *Independent Living Center*, Facebook asserts that “there is no indication that the Court  
 9 ordered TAR over the City’s opposition.” Opp. at 5. That assertion requires an unduly cabined  
 10 reading of the order. In an order entered June 26, 2014, the court recounts that, in December  
 11 2012, it entered a scheduling order requiring the parties to complete discovery in September  
 12 2013. Ex. 7 at 1.<sup>2</sup> “Needless to say, the deadline was not met” for the primary reason that  
 13 keyword searches, resulting from “months of haggling,” had proven unworkable. *Id.* (This sounds  
 14 familiar.) As a result of the months of delay, *Independent Living Center* “ordered the City to use  
 15 predictive coding to locate the most relevant documents,” forcing it to hire and pay for an outside  
 16 vendor. *Id.* at 1-2; *see id.* at 3 (“the Court ordered the City to buy” the TAR service). That the  
 17 court “ordered” the City to implement and pay for TAR means that the City was required to  
 18 implement TAR over its objection.

19 Finally, Facebook points out that the parties in *EOHRB* “agreed that the defendants would  
 20 use TAR” and plaintiffs would not. Opp. at 5. That’s because the court ordered the parties to use  
 21 TAR absent a modification of the order for good cause shown. Ex. 8 at 1-2. The defendants’  
 22 “willingness” to implement TAR was therefore a “willingness” to comply with the court’s order.  
 23 Plaintiffs were able to show good cause why they should be exempted from the court’s order to  
 24 use TAR—they had a low volume of relevant documents expected to be produced in discovery,  
 25 which meant the cost of implementing TAR would likely be outweighed by the benefit of its use.  
 26 *Id.* at 2. Facebook cannot say the same.

---

27 <sup>2</sup> All exhibit citations refer to the Declaration of Lesley Weaver filed in support of Plaintiffs’  
 28 opening brief.

1 Facebook's opposition relies on a number of cases for the proposition that a court cannot  
 2 require a party to implement TAR against its wishes, but those cases do not share the  
 3 circumstances present here and conflict with *Mercedes-Benz*, *Winfield*, *Independent Living*  
 4 *Center*, and *EOHRB*.

5 In *Hyles v. New York City*, plaintiffs moved for an order requiring the City to implement  
 6 TAR during the earliest months of the parties' ESI negotiations. *See* 2016 WL 4077114, at \*1-2  
 7 (S.D.N.Y. Aug. 1, 2016) (noting that plaintiff requested defendants use TAR immediately after  
 8 the parties' initial discussions about the use of keyword searches). The court further noted that if  
 9 plaintiff later demonstrates deficiencies in the City's production, it may have to re-do its search  
 10 (citing Sedona Principle 7), but, due to the early stage of discovery, "that is not a basis for Court  
 11 intervention *at this stage of the case*." *Id.* at \*3 (emphasis added); *see In re Viagra Products*  
 12 *Liability Litigation*, 2016 WL 7336411, at \*2 (N.D. Cal. Oct. 14, 2016) (refusing to compel  
 13 implementation of TAR "especially in the absence of any evidence that Pfizer's preferred method  
 14 would produce, or has produced, insufficient discovery responses," and allowing plaintiff to  
 15 revisit the issue "if Plaintiff contends that Pfizer's actual production is deficient").

16 Here, the parties are more than two years into discovery, a year and a half after  
 17 implementation of the ESI protocol, and just over four months from the deadline for substantial  
 18 completion of discovery. Further, as the Special Master is aware, discovery has been and  
 19 continues to be bogged down by numerous lingering foundational discovery disputes, resulting in  
 20 the production of exponentially fewer documents than in other large MDL actions. *See* Plaintiffs'  
 21 Opening Brief at 8. Thus, unlike *Hyles* and *Viagra*, this case is at an appropriate stage for the  
 22 Special Master to intervene. *Hyles* further noted that "[t]here may come a time when TAR is so  
 23 widely used that it might be unreasonable for a party to decline to use TAR." *Id.* In the  
 24 circumstances present here, five years after *Hyles*, Facebook's declination is unreasonable.

25 The other cases on which Facebook relies are readily distinguishable or inapt. *See In re*  
 26 *Bridgepoint Educ., Inc.*, 2014 WL 3867495, at \*4 (S.D. Cal. Aug. 6, 2014) (putting emails  
 27 already screened through predictive coding is likely to negatively impact the reliability of the  
 28

coding, a concern that can be addressed here in the TAR protocol, and noting that defendants are willing to run additional search terms against the already screened documents, which Facebook is not); *Hastings v. Ford Motor Co.*, 2021 WL 1238870, at \*2-3 (S.D. Cal. Apr. 2, 2021) (does not concern or otherwise address TAR); *In re Biomet M2a Magnum Hip Implant Prods. Liab. Litig.*, 2013 WL 1729682, at \*2-3 (N.D. Ind. Apr. 18, 2013) (defendant was already using TAR; plaintiff wanted it to re-run TAR on a broader set of documents); *Kleen Prods. LLC v. Packaging Corp. of Am.*, 2012 WL 4498465, at \*5 (N.D. Ill. Sept. 28, 2012) (plaintiffs agreed to withdraw their demand that defendants apply TAR and agreed not to argue that defendants should be required to implement TAR in the future).

None of the cases cited by either party is binding on the Special Master. To the doubtful extent any of the cases suggest that a federal court—or a master duly appointed by a federal court—lacks the power to require TAR, that suggestion should be rejected. For one thing, federal courts’ “inherent powers” give them the “broad discretion to make discovery” rulings. *Unigard Sec. Ins. Co. v. Lakewood Eng’g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992) (citation and quotation omitted). For another, Rule 26(c)(1)(B) gives courts the power to “specify[] terms, including time and place or the allocation of expenses, for the disclosure or discovery.” This provision gives courts “great flexibility in devising appropriate terms or conditions for discovery in a given case.” 8A FEDERAL PRACTICE AND PROCEDURE § 2038 (3d ed. 2021); *see also id.* § 2035 (noting that a party seeking discovery can make a motion under Rule 26(c)). The cases supporting the Special Master’s authority to require Facebook to implement TAR are more apt and compelling than the cases going the other way.

### C. Plaintiffs Offer Substantial Justification for TAR

In contending that Plaintiffs offer no justification for implementing TAR, Facebook ignores Plaintiffs’ opening brief and erases the history of discovery in this case.

***Facebook was right to advocate for TAR.*** Facebook contends that its prior advocacy for TAR does not require the Special Master to implement TAR against Facebook’s wishes now. Opp. at 5. Whether true or not, Facebook’s prior advocacy provides accurate and persuasive

1 reasons to use TAR. Plaintiffs agree with the points Facebook made in the before-times: TAR  
 2 will accelerate the pace of discovery and facilitate timely compliance with discovery obligations.

3 Moreover, Facebook's flipflop raises obvious questions about Facebook's credibility. If  
 4 Facebook believes its definition of relevance is appropriate, a process involving a discussion of  
 5 how it is defining relevance, conducted under the watchful eye of an informed Special Master,  
 6 should present no concerns. But Facebook is apparently very concerned. And Facebook's new  
 7 disclosure that the custodial documents it has collected have a responsiveness rate of 3% raises  
 8 questions about Facebook's "analytics" and how they define responsiveness. As Facebook has  
 9 made clear in both word and deed, it believes it is entitled to define relevance narrowly to  
 10 eliminate from production critical information that is plainly discoverable.

11 ***Implementing TAR will make discovery more efficient.*** Facebook contends that  
 12 implementing TAR now will delay discovery. Opp. at 14. It is widely agreed that TAR is more  
 13 efficient than manual review. *See, e.g.*, Plaintiffs' Opening Brief at 7, 8. Nevertheless, Facebook  
 14 asserts that "[l]itigating document-by-document disputes in the context of TAR" will be  
 15 inefficient and improperly enable Plaintiffs to "micromanage Facebook's review." Opp. at 14.  
 16 But it is precisely to *avoid* document-by-document disputes that Plaintiffs seek and have sought a  
 17 cooperative process to define relevance and train the TAR tool. *See, e.g.*, Exs. 5, 14.

18 ***TAR will advance cooperation and transparency.*** Facebook asserts that TAR is not  
 19 expressly required by the Northern District's *Guidelines*. Opp. at 7-8. That's true. But Guideline  
 20 1.02 (Cooperation) requires cooperation and transparency. Facebook has been neither cooperative  
 21 nor transparent. Discovery, rather, has been a hall of mirrors. Plaintiffs have pushed for  
 22 discussions for *years* on numerous issues, only to get nowhere. Plaintiffs have secured orders  
 23 telling Facebook to do things it still refuses to do. *See, e.g.*, Dkt. No. 559 (named plaintiffs' data);  
 24 Dkt No. 608 (business partners). *TAR* is merely a tool that can help advance the cooperation and  
 25 transparency that have been lacking.

26 ***Plaintiffs have identified numerous deficiencies in Facebook's production.*** Facebook  
 27 contends Plaintiffs have identified no deficiencies in Facebook's production. Opp. at 9. This is  
 28

1 untrue. Discovery in this case has largely proceeded in a step-by-step manner, whereby Plaintiffs  
 2 were prohibited from raising certain disputes until other actions were complete. There remain a  
 3 score or more of disputes that Plaintiffs are attempting to raise. Some concern the insufficiency of  
 4 productions made to date (*e.g.*, the named plaintiffs' data). Others concern the addition of  
 5 custodians or non-custodial sources based on the documents that have been produced (*e.g.*, Mark  
 6 Zuckerberg's and Sheryl Sandberg's custodial files, non-custodial ESI like the Tasks, Privatron,  
 7 and Quip databases and relevant internal group Walls). Still others concern discovery requests to  
 8 which Facebook has not produced relevant documents at all.

9 ***Facebook is not on track to meet the substantial completion deadline.*** Facebook says  
 10 there's no need for TAR because it's on track to meet the substantial completion deadline. Opp. at  
 11 10. That is only true if it continues to define relevance in an improperly narrow manner and  
 12 understands its obligation as being substantially complete once production from the currently  
 13 agreed set of custodians ends. However, for the reasons set forth here, in Plaintiffs' opening brief,  
 14 in Court filings, and in communications with the discovery mediators, Facebook has been using  
 15 an improperly narrow definition of relevance and has yet to engage in discussions about a  
 16 massive amount of discovery it must still produce. Indeed, Facebook addresses production from  
 17 Quip, Privatron, Tasks, and Scuba for the first time in its opposition. Opp. at 12. Facebook says  
 18 these were "recently raised . . . in mediation." *Id.* Yes, but Plaintiffs first raised them years ago,  
 19 only for Facebook to refuse to discuss them until production from the initial custodians was  
 20 complete.

21 ***Facebook's governmental productions are the bare minimum of what's required.***  
 22 Facebook touts its reproduced production from ten government matters. Opp. at 10. Facebook  
 23 deserves no plaudits for producing ready sets of relevant documents. While Judge Chhabria  
 24 expressed his expectation that these documents would provide the vast majority of the documents  
 25 Plaintiffs want here, that expectation has not been met. Plaintiffs bring a far wider range of claims  
 26 than in the government actions, and have burdens of proof, including damages, that the  
 27 governmental entities did not. Thus, Plaintiffs need a wider swath of production from Facebook.  
 28

Further, the governmental investigations revealed that Facebook consistently withheld relevant documents. As Federal Trade Commissioner Rohit Chopra stated in dissenting from the FTC's 2019 order imposing a \$5 billion penalty on Facebook: "In my view, there were multiple inconsistencies and deficiencies in Facebook's responses to questions. I question[] whether the company's document productions were truly complete."<sup>3</sup> *See also, e.g., Annie Palmer, California AG reveals Facebook probe, says company has been dragging its feet*, CNBC (Nov. 6, 2019) (Facebook has "refused to conduct a complete search for responsive documents"). Plaintiffs are entitled to the relevant documents withheld from governmental investigations.

***Responses to Facebook's remaining points.*** Facebook makes several assertions that, while not relevant, require brief responses. It asserts that the ESI Order requires it to produce embedded images. Opp. at 12. That is incorrect, but the more salient point is that Facebook has burned nearly a year, trickling out fewer than 10,000 custodial documents per month, and about a quarter of those documents are essentially contentless images that needed no review at all.

Finally, Facebook moves to strike § IV.C of Plaintiffs' opening brief, which asks the Special Master to implement a TAR protocol designed to meet the needs of this case. Plaintiffs included this section to avoid unnecessary delays in the event the Special Master requires Facebook to implement TAR. Cf. Opp., § D ("Imposing a TAR Process Now Would Delay Discovery"). The exhibits referenced are already part of the record. Dkt. Nos. 697-1, 697-2. The Special Master should deny the motion to strike.

### III. CONCLUSION

The Special Master has the discretion to require Facebook to implement TAR and should do so.

Dated: September 13, 2021

Respectfully submitted,

KELLER ROHRBACK L.L.P.

BLEICHMAR FONTI & AULD LLP

By: /s/ Derek W. Loeser  
Derek W. Loeser

By: /s/ Lesley E. Weaver  
Lesley E. Weaver

<sup>3</sup> Available at [https://www.ftc.gov/system/files/documents/public\\_statements/1536911/chopra\\_dissenting\\_statement\\_on\\_facebook\\_7-24-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf).

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# EXHIBIT D



**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

IN RE: FACEBOOK, INC. CONSUMER  
PRIVACY USER PROFILE LITIGATION,

This document relates to:

ALL ACTIONS

MDL No. 2843

Case No: 18-MD-2843 VC (JSC) (N.D. Cal)

Hon. Vince Chhabria

Courtroom 4 – 17th Floor

Special Master: Daniel Garrie, Esq.

**ORDER REGARDING THE USE OF TAR**

JAMS Ref. No: 1200058674

## **BACKGROUND**

1. On August 18, 2021, Special Master Daniel Garrie (“Special Master Garrie”) and Judge Gail Andler declared impasse on the issue of whether Facebook should be compelled to use Technology Assisted Review (“TAR”) in their review and production.

2. Pursuant to the Protocol for Resolving Discovery Disputes, Plaintiffs submitted their opening brief regarding the use of TAR on August 30, 2021. Plaintiffs argue that requiring Facebook to implement TAR is within the Special Master’s discretion and Facebook should be compelled to use TAR because (a) TAR will increase the pace of discovery, which Plaintiffs assert is currently insufficient to meet the needs of the case; and (b) implementing a TAR protocol will increase cooperation and transparency in discovery, which Plaintiffs assert have been insufficient thus far as “Facebook has continued to assert an unduly narrow view of relevance”. See Plaintiffs’ Brief Regarding the Use of TAR.

3. Pursuant to the Protocol for Resolving Discovery Disputes, Facebook submitted their Opposition to Motion to Compel TAR on September 9, 2021. Facebook argues that (a) the ESI Protocol forecloses Plaintiffs’ request that the Special Master compel TAR; (b) the case Law unanimously rejects Plaintiffs’ request for an order compelling TAR; (c) Plaintiffs offer no justification for an order compelling Facebook to use TAR; and (d) compelling Facebook to use TAR at this stage would delay discovery. See Facebook’s Opposition to Motion to Compel TAR.

## **ORDER**

4. Special Master Garrie finds that additional information pertaining to Facebook’s review is necessary to rule on the TAR related issues. Within 6 business days, Facebook is to provide the items below to Special Master Garrie.

- i. Facebook is to make available a technical resource (witness) knowledgeable in the analytics, review tools, and methodologies used in Facebook's production to guide Special Master Garrie through an in-camera review of samples of the documents reviewed and to explain the review process.
- ii. Facebook is to provide Special Master Garrie a sample of 500 documents from the unreviewed documents claimed to have a 3% responsiveness rate. See Facebook's Opposition to Motion to Compel TAR, at 14.
- iii. Facebook is to provide a list of the repositories that are included in the scope of their review, designating as follows: (a) which repositories have been collected and which remain to be collected, if any; (b) which repositories have been searched; (c) which repositories have been reviewed; (d) which repositories are custodial sources and which are non-custodial sources.
- iv. Facebook is to provide written responses clarifying the following points from their Opposition to Motion to Compel TAR.
  1. "Facebook has now completed its first-level human review of more than two-thirds of the documents that are most likely responsive." See Opposition to Motion to Compel TAR, at 14.
    - a. What does Facebook mean by "documents that are most likely responsive"?
    - b. How did Facebook determine that these documents are most likely to be responsive?

2. “To date, Facebook has produced 1,959,618 pages over 45 productions, in addition to more than 500 pages of interrogatory responses.”

See Opposition to Motion to Compel TAR, at 10.

- a. How many documents comprise the 1,959,618 pages stated above?
- b. Do the 1,959,618 pages stated above include documents from the government productions?

5. Upon the filing by Facebook of the supplemental information requested, the matter will be taken under submission by the Special Master without further briefing or argument except as deemed necessary by the Special Master.

**IT IS SO ORDERED.**

September 22, 2021



Daniel Garrie  
Discovery Special Master

**PROOF OF SERVICE BY E-Mail**

Re: In re: Facebook, Inc. Consumer Privacy User Profile Litigation (Special Master)  
Reference No. 1200058674

I, Anne Lieu, not a party to the within action, hereby declare that on September 22, 2021, I served the attached ORDER REGARDING THE USE OF TAR on the parties in the within action by electronic mail at El Monte, CALIFORNIA, addressed as follows:

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Parties Represented:

Facebook, Inc.

I declare under penalty of perjury the foregoing to be true and correct. Executed at El Monte,  
CALIFORNIA on September 22, 2021.

/s/ Anne Lieu

Anne Lieu

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# EXHIBIT E



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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

IN RE: FACEBOOK, INC. CONSUMER  
PRIVACY USER PROFILE LITIGATION,

This document relates to:  
  
ALL ACTIONS

CASE NO. 3:18-MD-02843-VC

**FACEBOOK'S SUPPLEMENTAL  
SUBMISSION IN OPPOSITION TO  
PLAINTIFFS' MOTION TO COMPEL  
TAR**

Defendant Facebook, Inc. (“Facebook”) hereby provides the following responses to the requests for information posed in paragraph 4 of the Special Master’s September 22, 2021 Order Regarding the User of TAR (the “Order”).

**Request (i): Facebook is to make available a technical resource (witness) knowledgeable in the analytics, review tools, and methodologies used in Facebook’s production to guide Special Master Garrie through an in-camera review of samples of the documents reviewed and to explain the review process.**

Facebook will make available to the Special Master at his convenience during his *in camera* review Gibson Dunn attorneys who are knowledgeable about Facebook’s review process in this case, including the analytics, review tools, and methodologies used in Facebook’s production. Facebook will also ensure that an attorney from Facebook’s in-house eDiscovery team and a representative from its vendor are available if needed by phone and email during the *in camera* review session.

**Request (ii): Facebook is to provide Special Master Garrie a sample of 500 documents from the unreviewed documents claimed to have a 3% responsiveness rate. See Facebook’s Opposition to Motion to Compel TAR, at 14.**

Facebook will provide this sample to the Special Master on an *ex parte* basis for the Special Master’s *in camera* review under separate cover.

**Request (iii): Facebook is to provide a list of the repositories that are included in the scope of their review, designating as follows: (a) which repositories have been collected and which remain to be collected, if any; (b) which repositories have been searched; (c) which repositories have been reviewed; (d) which repositories are custodial sources and which are non-custodial sources.**

Facebook’s review population includes just over 6 million documents collected from the repositories listed below (of which a little more than 5.6 million are the emails, chat documents, and family members that hit on the parties’ search strings). As detailed below, the vast majority of Facebook’s document collections are complete. Collections remain in progress from a few sources identified by a small number of custodians.

**Custodial Sources:** The parties previously agreed that Facebook would investigate sources and collect documents from the custodial files of 81<sup>1</sup> custodians. In June 2020, the parties agreed to a

<sup>1</sup> On page 8 of its Opposition to Plaintiffs’ Motion to Compel, Facebook stated that this number was

process and schedule for Facebook to interview its custodians (where possible) in eight groups (as prioritized by Plaintiffs) and disclose relevant data sources for those groups on a rolling basis. Dkt. 461. Facebook disclosed its custodial data sources to Plaintiffs under that agreement last summer.

(a) A full list of those sources, along with their current status, is below.<sup>2</sup>

Data Source	Collection Status <sup>3</sup>
Email	Complete
Workplace Chat	Complete
IRC	Complete
Workplace Groups	Complete
Internal Tasks	Complete
Box	Complete
OneDrive	Complete
Google Drive / G Suite	Complete
OneNote	Complete
Zoho	Complete
Internal Wikis	Complete
Quip	Complete
DropBox	Ongoing (in progress for 17 custodians)
Local Files	On hold for 9 custodians due to COVID restrictions <sup>4</sup>

82, which was an inadvertent typographical error. The correct number is 81.

<sup>2</sup> Some data sources that Facebook disclosed to Plaintiffs last summer by source type (*e.g.*, instant messaging; online file storage) are listed here as specific repositories for purposes of providing increased transparency and precision.

<sup>3</sup> Facebook may need to perform targeted recollections to address technical issues encountered during review or make limited targeted collections based on information learned as review progresses.

<sup>4</sup> Due to restrictions on travel and the work-from-home protocols adopted during the COVID-19 pandemic, Facebook has not yet been able to collect hard copy documents or locally stored electronic files from custodians who are not present in the office. Facebook intends to complete these collections as soon as it can do so consistent with local orders and company policy.

(b) For custodial data source collections to which search terms are applied, the search process is completed for all documents as soon as they are processed and loaded into Facebook's review database.

(c) Documents from all of the custodial sources listed above are transferred to Facebook's document vendor and processed into a single review database promptly upon collection. Facebook is reviewing the materials collected from these sources as part of a single consolidated review workflow, and this consolidated review remains ongoing. Additional information on the status of the review is provided below in response to request (iv)(1).

**Non-Custodial Sources:** Facebook has also collected data and documents from non-custodial sources as necessary to respond to Plaintiffs' RFPs and information requests. Where non-custodial collections have been necessary, Facebook either identified the specifically requested materials within a particular data source and collected them for production or, in cases where no existing materials were responsive to Plaintiffs' requests, created new materials for production. These non-custodial collections are narrow in scope and tailored to particular RFPs, would not be fed into a TAR model for review, and remain ongoing. To the extent that Facebook determines, or the parties agree, that additional non-custodial sources may contain responsive materials, Facebook will promptly collect from and review those sources.

(a) Facebook has collected from the following non-custodial sources of documents: historical versions of Facebook's public-facing web-pages through the Content Management System; notifications made to users from a repository of user notifications, correspondence between the Named Plaintiffs and Facebook, and internal training materials related to Facebook's data storage systems.

Facebook has collected from the following non-custodial sources of structured data: data relating to the Named Plaintiffs' privacy settings and authorized applications from tables in the Hive

1 data warehouse; data from Facebook’s HR database showing the organizational structure of relevant  
2 teams; and the Named Plaintiffs’ DYI files.

3 (b) These non-custodial sources are identified for collection based on the content of the request  
4 or RFP to which they are responsive, so the search is complete upon collection.

5 (c) Documents and data collected from these non-custodial sources have been reviewed, QCed,  
6 and produced on a rolling basis as they have been identified.

7 **Request (iv)(1): “Facebook has now completed its first-level human review of more than two-thirds of the documents that are most likely responsive.” See Opposition to Motion to Compel TAR, at 14. What does Facebook mean by “documents that are most likely responsive”? How did Facebook determine that these documents are most likely to be responsive?**

8 The quoted statement in Facebook’s Opposition attempted to convey two separate ideas: (1)  
9 Facebook has completed its first-level review of two-thirds of all of the documents in its total review  
10 population, not just the documents that are likely be responsive; and (2) separately, Facebook has  
11 structured its review to maximize accuracy and efficiency by prioritizing, for both review and  
12 production, documents that are more likely to be responsive ahead of documents that are less likely to  
13 be responsive.

14 Facebook has used several methods and tools to inform and guide its human review process.  
15 To determine which documents are more likely to be responsive than others and prioritize likely  
16 responsive documents for review, Facebook has: (A) used the known responsive documents within the  
17 initial review population to develop targeted, narrowly tailored searches and applied those searches to  
18 other documents in the review population; (B) employed structured and conceptual analytics  
19 (specifically, email threading and conceptual clustering) to elevate documents for review that are in the  
20 same email thread as, feature the same concepts as, or have similar linguistic characteristics to  
21 documents identified as responsive;<sup>5</sup> and (C) streamlined review of non-substantive files as permitted  
22

23  
24  
25  
26  
27  
28 <sup>5</sup> In connection with its last production, Facebook disclosed to Plaintiffs that it is suppressing lesser-inclusive thread members from its review and production, which is permitted under the ESI Protocol with the supplementation of metadata for the withheld lesser-inclusive documents. Thus, the number

1 by section F of the ESI Protocol. Facebook has completed its review of the documents that these  
2 methods and tools elevated or prioritized for review as likely responsive. And the use of threading and  
3 the presence of a high volume of non-substantive files substantially reduce the size of the remaining  
4 population requiring substantive review.

5  
6 In anticipation of raising in mediation the possibility of using TAR to filter out non-responsive  
7 documents, Facebook trained an analytics model in Relativity to evaluate the potential effectiveness of  
8 TAR and confirm whether documents in the review set could be prioritized for review based on  
9 predicted responsiveness. Facebook has completed its first-level review of the documents and inclusive  
10 threads that the model identified as likely to be responsive and is in the process of completing its review  
11 of the remaining documents and inclusive emails in the review population, which the model has  
12 identified as likely to be non-responsive.

13  
14 Based on the application of these methods and tools and the sampling of remaining documents,  
15 Facebook anticipates that the remaining unreviewed documents will be largely non-responsive.

16 **Request (iv)(2): “To date, Facebook has produced 1,959,618 pages over 45 productions, in**  
17 **addition to more than 500 pages of interrogatory responses.” See Opposition to Motion to**  
18 **Compel TAR, at 10. How many documents comprise the 1,959,618 pages stated above? Do the**  
19 **1,959,618 pages stated above include documents from the government productions?**

20 The numbers quoted in this question have changed since Facebook filed its Opposition, as  
21 Facebook made an additional production to Plaintiffs on September 21, 2021. Including that  
22 production, Facebook has now produced 516,837 documents to Plaintiffs, comprising 2,014,463 pages.  
23 Those figures include Facebook’s cloned productions of the documents produced to government  
24 regulators.

25  
26  
27  
28 of email and chat documents that will be reviewed and potentially produced will be only a subset of  
the number of email and chat documents against which the search terms were run.

1 Dated: September 30, 2021

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

IN RE: FACEBOOK, INC. CONSUMER  
PRIVACY USER PROFILE LITIGATION,

This document relates to:  
  
ALL ACTIONS

CASE NO. 3:18-MD-02843-VC

**DECLARATION OF DENNY THONG IN  
SUPPORT OF FACEBOOK'S  
OPPOSITION TO PLAINTIFFS'  
MOTION TO COMPEL TAR**

1           1.       My name is Denny Thong. I am a senior Director – eDiscovery – Americas at Ankura  
2 Consulting Group, LLC (“Ankura”). I have worked for Ankura for just under a year and have worked  
3 in the eDiscovery space for nearly 15 years.

4           2.       I am Senior Director in-charge of the project team working on the *In re: Facebook, Inc.*  
5 *Consumer Privacy User Profile Litigation*, Case No. 3:18-MD-02843-VC (N.D. Cal.) (the “MDL”) for  
6 our client Facebook, Inc. (“Facebook”). Facebook is represented by Gibson, Dunn & Crutcher LLP  
7 (“Gibson Dunn”) in that matter. My team works closely with Facebook and Gibson Dunn to manage  
8 document processing, review, and production in the MDL.

9           3.       Facebook provides the documents it collects for review in the MDL to Ankura for  
10 processing, accompanied by standardized instructions for processing, including whether the documents  
11 will be deduplicated against other documents. Ankura stages and loads all documents it receives from  
12 Facebook into the processing database; Ankura does not use analytics or other tools to reduce the  
13 number of documents ingested into the processing database.

14           4.       In that processing database, Ankura processes and de-duplicates these documents using  
15 methods permitted by the Section L of Appendix A to the Stipulation and Order Governing the  
16 Production of Electronically Stored Information and Hard Copy Documents (“ESI Protocol”). Ankura  
17 also filters out common system files as permitted by Section F of the ESI Protocol. Ankura then applies  
18 the agreed-upon search strings to the agreed-upon custodial documents in the processing database.  
19 The resulting documents, including full families, are transferred to the Relativity database that is used  
20 to review documents. Ankura does not use any other tools or analytics to reduce the number of  
21 documents that are transferred from the processing database to the review database.

22           5.       The total review population in the review database is approximately 6 million  
23 documents. Ankura has not applied analytics or used any other tools to remove documents from the  
24 review database. Ankura has only applied analytics or other tools to documents in the review database  
25  
26  
27  
28

1 at the direction of Gibson Dunn or Facebook.

2 6. At the direction of Gibson Dunn and Facebook, Ankura has applied Ankura's Cluster  
3 Analysis tool, Relativity's Assisted Review Active Learning tool, and Ankura's Email Thread  
4 Application to documents in the review database. These tools have been used to prioritize and elevate  
5 documents for human review within the review database. Ankura has not used any analytics or other  
6 methods or tools to remove documents from the review database. Except as described in paragraphs 7  
7 and 8 below, Ankura has not applied analytics or any other tools to remove documents from the queue  
8 for human review.  
9

10 7. As Facebook has disclosed to Plaintiffs, Ankura has used email threading analysis to  
11 suppress emails identified as being Lesser Inclusive thread members of Last In Time Emails, as defined  
12 in Section F of the ESI Protocol, from review batches. These Lesser Inclusive emails have been  
13 suppressed from review, but they have not been removed from the review database. Threading has  
14 only been applied to suppress Lesser Inclusive emails from review (as permitted by Section F of the  
15 ESI Protocol), not other types of documents.  
16

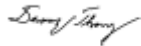
17 8. In addition, Ankura has worked with Gibson Dunn to identify certain categories of non-  
18 substantive documents, as defined under Section F of the ESI Protocol, including non-substantive  
19 embedded images and certain system files, and suppress them prior to production. If a parent document  
20 of one of these types of non-substantive documents is included in a production, the non-substantive  
21 family members are produced along with it, as required by ESI Protocol. While these non-substantive  
22 documents have been suppressed prior to production where consistent with Section F of the ESI  
23 Protocol, Ankura has not used analytics tools to remove these non-substantive documents from the  
24 review database.  
25

26 9. Ankura has not used any other tools or analytics to exclude or remove documents from  
27 the review database or exclude or remove documents within the review database from the queue for  
28

1 human review.

2 I declare under penalty of perjury that the foregoing is true and correct, and that I executed this  
3 Declaration on October 7, 2021, in Irvine, California.

4  
5 Denny Thong

6  
7 

8  
9 Senior Director – eDiscovery – Americas  
Ankura

**PROOF OF SERVICE BY E-Mail**

Re: In re: Facebook, Inc. Consumer Privacy User Profile Litigation (Special Master)  
Reference No. 1200058674

I, Anne Lieu, not a party to the within action, hereby declare that on October 9, 2021, I served the attached Supplemental Order Regarding The Use of TAR on the parties in the within action by electronic mail El Monte, CALIFORNIA, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at El Monte,  
CALIFORNIA on October 9, 2021.

/s/ Anne Lieu  
Anne Lieu  
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